

Legally non-binding citizen consultation via the Internet

An end in itself or one step closer to the democratic ideal?

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Abstract. *Citizen participation is back on the political agenda. This revitalization is fostered by a growing demand of society for greater political influence and the appearance of yet another new technology – the Internet. In regard to the possibility of binding decisions via the Internet (e.g. elections, referenda), there is general consensus that legal prerequisites are necessary. Most e-participation is legally non-binding, though. How much legal regulation do we need for non-binding online participation, or don't we need any at all? To answer that question, this paper firstly provides a definition of e-participation and a method to distinguish different types of participation [Sec.1]. Secondly, it discusses, which democratic indications are relevant for e-participation, emphasizing the significance of the local level and the new e-participation clause in NRW¹ [Sec. 2.1]. After a short review of the benefits and risks of e-participation [Sec. 2.2, 2.3], the paper finally deals with factual effects of non-binding (e-)participation and corresponding legal consequences [Sec. 3]. In conclusion, it identifies concrete areas for further research [Sec. 4].*

Keywords: e-participation, level of intensity, factual political effects, regulation

1. E-participation – What do we talk about?

Researchers need to find and agree on terms and definitions to describe and discuss scientific observations. If research is done on topics, which are rather revitalized than new, however, it may be enough to alter the understanding of already existing concepts, to broaden definitions and modify scientific terms respectively to link them with new levels of meaning.

Online participation is an excellent example for such an approach, since many (offline) principles have just been equipped with the prefix “e” for “electronic”: e-participation, e-government and e-democracy are the most discussed *concepts 2.0*. This field of research comprises scholars from many different disciplines, such as political science, law, sociology as

¹ North Rhine-Westphalia, one of 16 federal states in Germany.

well as communication studies, information science and economics. Therefore, it is all the more important to distinguish carefully between different terms, concepts and research perspectives, especially, if they are closely related to one another.

1.1. Definition of E-Participation

In this paper, *e-participation* (synonymously used with online participation) is understood as legally non-binding, deliberative and voluntary contribution of citizens to administrative/political decisions via top down initiated online processes (partly or completely organized via the Internet). The participation platforms/websites should at least partly be accessible to the public (the actual discussion may be for registered participants only). These processes can either be formal or informal. Participants shall be able to actively contribute to the discussion, e.g. by posting comments, statements and opinions, providing for information, making proposals, submitting ideas and expressing agreement or disagreement to the posts of others.²

1.2. Categorizing different types of e-participation

When categorizing types of (e-)participation, there are many different approaches, some of which are very detailed and complex. Before dealing with details, though, it may help to ask these four basic questions:

- 1) Is the participation process formal or informal?
- 2) Which political or administrative aims shall be accomplished?
- 3) At what level of intensity does the process take place?
- 4) Who is addressed to participate?

1.2.1. Formal or informal?

Participation can either be formal or informal [1]. A participation process is formal, if the competent authorities are legally obligated to initiate it.³ Informal participation on the other hand is initialized voluntarily.⁴ Formal participation leaves less flexibility to the initiators than informal participation, since aims, level of intensity and circle of participants are already set by law.

1.2.2. Participation aims

According to Fritsche [2] there are two main intentions for participation: making *rational political decisions* and reducing the *distance between rulers and those who are ruled*.

² This definition does not claim to be comprehensive or practicable to solve all e-participation related problems..

³ Often found in urban planning, in Germany cf. § 3 BauGB (Building Code), § 10 ROG (Regional Planning Act), § 10 III, IV BImSchG (Immission Control Act), § 9 UVPG (Environmental Impact Analysis Act), § 73 VwVfG (Administrative Procedure Act).

⁴ Internationally prominent examples for such informal participation are public budgeting and local action plans, e.g. for noise reduction.

In more detail, participation may inter alia aim at: strengthening civil engagement, gathering information, encouraging political discussions and enhancing transparency, legitimacy and acceptance [3,4]. Identifying and distinguishing individual aims and intentions for each participation process is indispensable. Only then, the initiators can decide, which type of process fits their needs and what kind of information they have to provide to enable citizens to participate. Also, evaluating a process as successful or failed is only possible in relation to the achievement or disappointment of the identified aims. Finally, different aims require different considerations on structure, design, content and outcome of the participation initiative (in regard to the consequences of different aims on representativeness cf. Sec. 1.2.5).

1.2.3. Level of intensity

There are multiple models presenting different levels of intensity [5]. In all models the lowest level of intensity is *information*. Participation types at this level are e.g. fact sheets, open houses, web sites or newsletters. The second commonly accepted level of intensity is *consultation*. At the consultation-level, citizens can express their opinion, e.g. via surveys, public comment, focus groups and public meetings. The highest level of intensity is a legally binding decision made by citizens in form of direct democratic instruments. Direct democracy (as *legally binding participation*) is left out of most participation-models, though.

Categories higher than consultation but lower than legally binding participation differ from model to model. The OECD⁵-model [6,7] for example determines three basic levels: information provision, citizen-consultation and *citizen active participation*. At the level of citizen active participation, citizens engage in decision making, while the final responsibility rests with the government. Macintosh [8] draws on this three-level-model. She determines the information-level as *e-enabling*, the consultation-level as *e-engaging* and the last level as *e-empowering*. While e-enabling and e-engaging is understood as top-down participation, bottom-up ideas are facilitated at the e-empowering-level. Medicmorec et al. [9] present a four-level-model consisting of information, consultation, *cooperation* and *codetermination*. At the cooperation-level, citizens are able to influence a decision by collaboratively preparing results. The term codetermination is defined as a decision, commonly made by citizens and politicians. This model is almost identical with the model presented by the working group e-democracy of the Austrian Federal Chancellery [10,11]. The only difference is, that the Austrian model does not use the term codetermination, but *co-decision* instead. Furthermore, co-decision is not understood as a separate level, but as a sub category of the cooperation-level. Finally, the IAP2⁶-model [12] – adapted by UNDESA⁷ [13] – distinguishes between five different levels of intensity, which are: information provision, consultation, *involving the public* (workshops, deliberative polling), *collaboration* (advisory committees, consensus-building, participatory decision making) and empowerment (delegated decisions, citizens' juries).

⁵ Organization for Economic Cooperation and Development.

⁶ International Association for Public Participation.

⁷ United Nations Department of Economic and Social Affairs.

1.2.4. Circle of participants

The circle of participant depends on the different *roles of citizens* “as customers, participators and creators, and even as sovereigns” [9].

1.2.5. Interdependency

The interdependency of these four basic questions shall be shown by the following example: A City Council decides to initiate an informal participation process on a noise-reduction action plan. Thereby, freedom of expression shall be accomplished and the citizens’ opinion(s) on different proposals shall be gathered. Also, the Council wants to accumulate helpful ideas and/or creative counter-proposals (*crowd sourcing*). These aims can only be achieved at the intensity-level of consultation respectively at the cooperation-level.

This reflects on procedural details, like the timeframe of participation. Educated proposals can only be accumulated, if the participation process takes place over an appropriate period of time [4]. It is also necessary to provide a solid basis of information in advance, to ensure a high discussion quality and good results [14]. Another crucial time related factor is, when to start the participation process. If it takes place at the co-decision-level, the initiators have to make sure that the decision still *can* be made [4]. Complex political decisions are time-intensive and need to be coherent with one another [14,15]. That’s why their preparation often consume a lot of resources and require binding arrangements with external partners, which both may lead to prejudices for active participation [16]

Finally, the circle of participants depends on the aims of the participation process and the level of intensity. If a conjoined decision with citizens in the role of the sovereign should be made to enhance legitimacy, the circle of participants has to be as representative as possible. In this example, though, the Council’s main interest is to gather new ideas by consulting/cooperating with citizens. At this stage, representativeness is not necessary, since the intended aim is equally accomplished, if only one citizen comes up with a helpful new idea [17]. The final decision, though, still has to be democratically legitimized. In conclusion, the democratic legitimation is obtained, as long as the City Councilors as elected representatives are responsible for further discussions about the idea and for making the final decision. How the idea was brought to their attention, is not a relevant concern.

2. E-participation – democratic implications

Democracy – *δημος* (dêmos) "people" and *κράτος* (krátos) "power" – is one of the central basic *principles of state structure*, guaranteed by the German constitution in art. 20 (2) GG⁸. Directly translated, democracy means *power by the people*.⁹ Consequently, sovereignty of the people is the very heart of democracy [15,18,19]. As art. 1 GG implies, the state should not only rule over the people, but also acknowledge it as a heterogenic group of individuals [20,21]. The people as a political entity, however, depends on organization and institutionalization [14,18]. Without constitutionalized procedural rules, sovereignty and the common will of the people,

⁸ Basic Law for the Federal Republic of Germany.

⁹ Defining ‘the people’ is one of the oldest debates in political science.

i.e. Rousseaus' *Volonté générale* [22], are nothing but nominal ideals [14]. Establishing the common will becomes the number one task of democracy.

Due to Luhmann [23] and Morlok [14,18], democracy can be understood as a *process of selection and complexity*. Selection means a process of evaluating, discussing, amending and finally choosing one of many diverse options. Complexity in this context means that the decision making process shall stay open to new arguments and different choices for as long as possible. Therefore, adequate "*input channels*" [18] have to be established. The more relevant interests are incorporated in the final decision, the more this decision is considered to be oriented towards the common good [14]. Hence, participation and (operationalized) influence on political decisions are the basis of democracy [14,18].

Secondly, democracy is able to *secure individual freedom and equality* and to *protect minorities by limiting political power* [18]. Most important for putting that into effect are *fundamental human rights*, protection of *political oppositions* as well as *effective control mechanisms* [15]. Human rights have to be constitutionally and equally guaranteed. Minorities must have the chance to become majorities; no "*tyranny of the majority*" [24]. Control can be guaranteed by the principles of *transparency and public debate* (public control), *independent courts* (judicial control) and the *division of powers*.

Finally, the third key aspect of democracy, which is significant for the following analysis, is the role of *trust and responsibility* [25].

2.1. The local/municipal level

The local/municipal level obtains a special role in regard to including citizens in political decision making. The Federal Constitutional Court considers municipalities as the *democratic nucleus* [26] that is *most likely resistant against dictatorship* [27,28]. Therefore, it is a central objective, to actively include citizens in the local political life and administrative decisions. At the same time, administration has to be efficient, though. As a result, municipalities have to find suitable solutions to ease the tension between the two central demands of local administration: *efficiency* on the one hand, *being close to the citizens* on the other hand [29].

2.1.1. The right to self-administration

Germany is a *democratic* state, governed by *the rule of law*, organized as a *federal republic*,¹⁰ which is divided into federal level (*Bund*), state level (*Länder*) and local/municipal level (*Kommunen*). This decentralized structure establishes a *vertical (bottom-up) division of power*, maximizing the *self-determination of the people* [14]. Legislative jurisdiction for local law is attributed to the federal states.¹¹ Nevertheless, within the limits prescribed by the laws, municipalities have the right to regulate all local affairs on their own responsibility (*right to*

¹⁰ Artt. 20, 28, 79 (3) GG guarantee these *principles of state structure* (Staatsstrukturprinzipien) both in the federal constitution and in the constitutional order of the federal states.

¹¹ Artt. 30, 70 (1) GG. According to art. 30 GG "the exercise of state powers and the discharge of state functions" is a matter of the federal states, "except as otherwise provided or permitted by this Basic Law". According to art. 70 (1) GG legislative jurisdiction is attributed to the federal states, "insofar as this Basic Law does not confer legislative power on the Federation".

self-administration). This fundamental right to self-administration is guaranteed in art. 28 (2) GG, respectively in the state constitutions. It is concretized in municipal codes. Furthermore, it is strengthened by art. 93 (1) no. 4 b GG, guarantying municipalities the right to file constitutional complaints at the Federal Constitutional Court on the ground that their right to self-administration has been infringed. Also, local self-administration is required under EU law, which specifies in Protocol CETS No. 207 that citizens shall have the right to participate in the affairs of a local authority.¹²

2.1.2. The local legal system in NRW¹³ - City Council and offline participation

At the local level, the main political body is the *City Council*, consisting of the councilors and its chairman, the mayor.¹⁴ In NRW, both the councilors and the mayor are directly elected by the citizens. Since the City Council controls the administration, it can easily be mistaken for a local parliament. Legally speaking, however, the Council is an administrative body¹⁵ (therefore part of the executive power) [30,31]. In contrast to federal/state Parliament, it cannot enact formal law. Provided that the Council is authorized by formal federal or state law,¹⁶ it may adopt *local statutes* (valid for the city area). Also, in contrast to professional politicians in federal/state Parliament, the councilors at the local level are volunteers. Furthermore, only citizens of German nationality from age 18 can vote in federal Parliament elections. At the local level, though, every citizen of the European Union from age 16 has the right to vote in City Council elections.

These structural differences to the state/federal level facilitate (online) participation at the local level. Thus, the municipal code is equipped with a broad variety of input channels:

- 1) *Direct democratic instruments*: According to § 26 (1) GO NRW, legally binding referenda can be initiated both by the citizens and by the City Council (provided that the formal requirements are met (especially the necessary amount of signatures – *quorum*)).
- 2) *Duty of/right to information*: The City Council is *obligated to inform* the citizens about important administrative matters, § 23 GO NRW. Citizens can *submit questions* to the Council, § 48 GO NRW or *file complaints and suggestions*, § 24 GO NRW. Further rights to information are inter alia guaranteed in art. 5 (1) GG, § 29 VwVfG¹⁷ and in the provision of the Freedom of Information Act (IFG). Further rights to be heard are inter alia guaranteed in art. 17 GG (right to petition), § 25 (3) VwVfG and § 28 (1) VwVfG.

¹² European Charter of Local Self-Government, 15. Oct.1985, CETS No.122, BGBl. 1987 II, p. 65, in conjunction with the Additional Protocol on the right to participate in the affairs of a local authority, 16. Oct. 2009, CETS No. 207, entered into force on 1 June 2012, not yet ratified by Germany.

¹³ Since the concrete organization of municipalities and their government/administration differ from state to state, the following argumentation is exemplarily based on the local legal system in NRW.

¹⁴ § 40 (2) GO NRW (municipal code).

¹⁵ § 41 (1) GO NRW.

¹⁶ For example art. 28 (2) sent. 1 GG, art. 78 (1, 2) LVerf NRW (state constitution) in conj. with § 7 GO NRW.

¹⁷ Administrative Procedure Act.

- 3) *Residents' request*: According to § 25 GO NRW, residents can force the City Council to deal with and decide on a local matter within its jurisdiction (certain signature quorum required).
- 4) *Experts in local committees*: Local committees are not exclusive to councilors of the City Council. As long as the majority of members consists of councilors, *citizens with expertise* can become members of local committees, too, § 58 (3) GO NRW. Moreover, the committees are allowed to consult with external experts and citizens who are primarily affected by the pending decision.

Additionally, some municipalities regulate further methods and details of such input channels in local statutes or policy guidelines on citizen participation.

2.1.3. § 18 eGovG NRW – Legal anchor of legally non-binding e-participation

In general, *Bund* (federal level), *Länder* (state level) and *Kommunen* (municipal/local level) have separate jurisdictions, artt. 30, 28 (2) GG. To promote the digitalization of state authorities, though, art. 91 c GG has been added to the Federal Basic Law (federal constitution). According to art. 91 c GG, *Bund* and *Länder* may cooperate to facilitate the establishment of new information technology systems. That points out, how seriously digital progress in the public sector is taken. The next step was the enactment of a federal Law on electronic Government (eGovG) and corresponding state laws.¹⁸ In these laws especially electronic information and communication channels have been established. The use of electronic devices to communicate with citizens has also been included in the Federal Administrative Procedure Act, § 3a VwVfG Bund. § 4 a (4) BauGB introduces the possibility to supplementary use electronic systems for formal participation in urban planning.

NRW is the first state,¹⁹ *anchoring legally non-binding informal e-participation in formal state law* [32]. According to the new e-participation clause, § 18 eGovG NRW,²⁰ state and local authorities are encouraged to initiate electronic – especially online – participation. This clause does not affect any other existing participation methods (cf. Sec. 2.1.2). Furthermore, § 18 eGovG NRW is the first formal law in Germany, creating certain (minimum) responsibilities for state/local authorities in regard to informal e-participation. Firstly, the initiators have to *guarantee an appropriate timeframe*. Secondly, they are responsible for a *transparent course of the process*. Finally, from the day of the enforcement of the law, initiators of e-participation are legally obliged to *evaluate, revise and officially announce/publish the results*, § 18 (2) eGovG NRW.

¹⁸ eGovG is in force in Baden-Wuerttemberg, Bavaria, Saxony and Schleswig-Holstein. Legislative process is initiated in Berlin and NRW. In Rhineland-Palatinate, transparency law in progress.

¹⁹ Baden-Wuerttemberg adopted the “*Verwaltungsvorschrift Öffentlichkeitsbeteiligung*” (administrative regulation on public participation) in 2013 (GABl. Nr. 2, 2014, p. 22) for informal participation in urban planning, which is only binding on state authorities (not municipalities), though.

²⁰ Draft (Dec. 2015), not yet in force.

<https://egovg.nrw.de/egovg/de/home/file/fileId/92/name/MMD16-10379.pdf>. (Accessed 18 Feb. 2016).

Statistics on the actual use of the Internet in informal participation (online participation as defined in Sec. 1.1) at the municipal level in NRW are currently raised by a group of doctoral candidates with the NRW Fortschrittskolleg Online-Partizipation.²¹

2.2. The “win-win-win”-situation

Benefits of e-participation have been described in almost every single paper on e-democracy. *Win-win-win-situation*²² is the new buzzword for the *dialogue* between citizens, politics and administration [33]. All benefits correspond to the two groups of intentions of public participation: making *rational political decisions* on the one hand and reducing the *distance between rulers and those who are ruled* on the other hand [2].

Since a margin of discretion is left to political representatives, delegating political power from the people (as sovereign) to politicians require *trust* [14]. Those who are ruled have to trust in the rulers to decide in their best interest. Establishing a broad range of *input- and control-channels* [Sec. 2], such as e-participation, can help to strengthen this trust, provided that the process is transparent and the results of e-participation are taken seriously. Also, *consensus-building* is a key task of participation. This task is especially important, since politicians have to make decisions *despite any uncertainties* [34,35] they may be confronted with (like future court decisions, new knowledge that is not available at the time of the decision making etc.). In open discussions with interested citizens, *new relevant information and ideas* can be brought to the political discourse, which might have been left of considerations without public consultation [21]. The display of pro and contra arguments may also support broader *acceptance* of political decisions. Finally, a *pre-selection of relevant arguments* can increase *efficiency* of the further political decision making [36].

Online participation, if used properly, can *make participating in political decision flexible and easy*. All relevant information is *centralized in one source* (e.g. a website), which can be *accessed at any time and from any place*. Citizens are not dependent on public meetings anymore, but they can individually plan, how, from where and when to participate. Moreover, the Internet facilitates *documentation and evaluation* of participation processes [17].

2.3. Risks of online participation

On the other hand, the use of the Internet to include citizens in political decisions bears risks which need to be addressed. Due to the anonymity of online discussions (registration with pseudonym) e-participation is vulnerable to non-topic-related posts. In face to face discussions, the group of participants is more likely to self-regulate personal disputes and dismiss off-topic statements. An important course of action to avoid such misuse is the establishment of binding code of conducts (*netiquette*) and suitable sanctions in case of infringement, like being blocked from the website and legal charges for insulting language. This problem may also be solved by qualified moderation, provided that authorities are clear (on which basis posts may be deleted, users may be blocked, etc.). According to Kubicek et al. [36] consensus-building and reciprocal

²¹ <http://www.fortschrittskolleg.de/projekte/datenbank/>. First results approx. in May '16. (Accessed 18 Feb. 2016).

²² F. Fischer, interview “Die Bürgerbeteiligter“, online article, 27 Jan. 2016. <http://www.wuppertaler-rundschau.de/lokales/die-buergerbeteiligter-aid-1.5719682>. (Accessed 18 Feb. 2016).

understanding of opposing arguments is easier in face-to-face-discussions and smaller discussion groups, than via the Internet. Anonymity may also obstruct transparency, since it is usually allowed to register multiple times with different pseudonyms. As a consequence, it is not possible, to identify the role of participants as citizens, politicians, experts or agents for certain interest groups. The higher the level of intensity, though, the more important is transparency. If citizens and politicians collaborate on the Internet to make a conjoined decision, it must be clear which arguments were posted by state authorities. Only then, they can later be held responsible for the final decision. Parycek et al. [5] recommend, the higher the level of intensity, the higher the level of identification.²³

Furthermore, the higher the complexity of a topic, the more *expert input* is needed to ensure good argumentation and a dynamic discourse. In face-to-face meetings, the discussion leader can make sure that everybody has received and understood the required information. Online, participants have to take care of being properly informed themselves. Therefore, online input-channels may nurture the influence of organized interest groups rather than individuals. In conclusion, the higher the level of intensity, the more democratic standards have to be fulfilled by e-participation [37] (such as the principle of *equal possibilities* to influence political decisions). In this context, Kißler [38] recalls the problem of a *silent majority* in participation processes and warns about a *tyranny of the minority* in cooperative democracy. This minority often consists of only those citizens, who don't agree with the decision [4]. Finally, the *digital divide* [39] causes further problems in regard to a representative circle of participants.

3. E-Participation and legal/political commitment

Participation processes, online and offline, formal and informal alike, do not create legally binding results. Yet, they may factually have binding character.

3.1 Factual effects of legally non-binding citizen participation

Legitimate private interests shall be included in political decisions. Legally, this assumption is supported by the *obligation to balance private and public interests* (*Abwägungsgebot*) in urban planning, § 1 (7) BauGB. This obligation originally derives from the *rule of law* and the *principle of proportionality*, art. 20 (3) GG. In limited extent,²⁴ infringements can be reviewed by courts [16,40]. One purpose of formal participation in urban planning is to bring relevant interests to the governments' attention [41]. Informal deliberative participation, though, primarily *evaluates public opinion*. The rule of law guarantees individual liberty and human rights. According to the independent mandate, on the other hand, members of Parliament and the City Council are free from external preferences, art. 38 (1) GG, art. 30 (2) LVerf NRW,

²³ The lowest level is no identification, on the highest level there are unique identification methods implemented by the state (such as the Austrian citizen card).

²⁴ The court may supervise, if public and private interests have not been weighted at all (*Abwägungsausfall*), if some relevant interests have been left out of the weighting (*Abwägungsdefizit*), if the relevance of an interest has been misjudged (*Abwägungsfehleinschätzung*) and if the interests have not been weighted correctly according to their relative relevance to one another (*Abwägungsdisproporz*).

§ 43 (1) GO NRW. Paradoxically, it is also the independent mandate which opens up political decision making for influence by citizens [14]. Elected representatives shall be free to decide which arguments and concerns they want to include in their final decision.

This liberty, though, could be prevailed by factually binding effects of participation. If participation processes are initiated top-down, the public expects the results (though legally non-binding) to have an actual impact (*political efficacy*) on the pending decision [17,25]. If the results are not taken into serious consideration, poor reputation, public protests, rejection of the decision, disadvantages in political competition, mistrust and eventually the loss of office in the next elections, are possible consequences [4]. Also, citizens can put deviating decisions up for a public referendum, provided that the formal requirements are met. The higher the level of intensity, the higher the expectations towards the actual impact [42], thus, the greater the effort to justify a deviating decision [43].

Another motivation behind factual political commitment to the results of participation is related to the principle of efficiency. If consensus is built once, defending it by following public preferences can immensely reduce further transaction costs. These *factual effects* are intensified by the Internet and the use of online participation, since everybody with access and a little knowledge on how to use it, can spread and share information and critique. So called *Shitstorms*²⁵ can target political decisions as well as decision makers in person [44]. Social media and blogs are a significant second channel to traditional media and journalism. Posts by citizens bear the risk of being subjective, incorrect or incomplete. In this context, responsive *communication as a function of the state* is more important than ever [45].

An example for factually binding results of legally non-binding participation is the local budget 2015/2016 in Bonn.²⁶ Administration asked citizens for comments and ratings on twenty five budgeting proposals. Citizens could also submit and discuss their own proposals online. All in all, 3700 citizens actively participated in the process, which was open for four weeks. With Bonn having 322.960 inhabitants, the number of participants has only been a little higher than 1% of the population. After the process had been closed, administration sorted out the 25 best rated of 390 citizen proposals. The list of these best performers and corresponding official statements by the administration have been passed to the City Council who finally decided on the local budget. Eight of these proposals have been fully adopted by the Council. Another eight have been partially adopted.

3.2. Consequences for the necessity of legal regulation – a sociological approach

According to § 10 VwVfG, administrative procedures do not have to be conducted in a particular form, except as otherwise provided by law. It might be assumed that, if even formal administrative procedures may be conducted without a particular form, this should apply a fortiori in respect of informal participation processes. Nevertheless, the (potentially) binding political effects of e-participation could make legal regulation necessary. To organize large group discussions, it is essential to set ground rules [14]. Qualified moderation facilitates

²⁵ A storm of (mass) indignation, which is often accompanied by insulting remarks.

²⁶ https://www.bonn.de/rat_verwaltung_buergerdienste/buergermitwirkung/buergerbeteiligung_haushalt/. “Bonn packt’s an”, citizen participation on the local budget 2015/2016. (Accessed 18 Feb. 2016).

consensus-finding by ensuring a structured course of discussion and the obedience of discussion rules. Normatively, the necessity to regulate e-participation can be derived from the social functions of law. From a sociological point of view, law is an instrument of power which shall preserve and promote social cohesion by balancing opposing interests [46]. Based on the *law-jobs theory* developed by Llewellyn [47], Rehbinder [46] presents a model of five social functions of law:

- 1) Elimination of conflict (function to react)
- 2) Controlling of behavior (regulatory function)
- 3) Legitimization and regulation of social power/authority (political function)
- 4) Organizing living conditions (planning function)
- 5) Juristic method (control function)

In regard to online participation, the two most important functions of law are the regulatory function, creating legal certainty, and the political function, clarifying authority and procedural rules. Both functions serve to restrict arbitrariness of the powerful, making their behavior predictable and accountable [44,46]. In regard to informal offline participation, such as citizen advisory groups, visioning workshops, round tables and planning cells, procedural rules are commonly used and largely standardized. If online participation shall transfer as much actual influence and impact to the participants, appropriate rules have to be adopted.

4. Conclusion

Online participation can be a powerful tool to both make rational political decisions and to reduce the distance between rulers and those who are ruled. If effectively used, it may enhance output-legitimation of political decisions. At the same time, input-legitimation of the final decision must not be decreased. By erasing potential conflict during the preparation of a political decision, online participation can reduce further transaction costs and increase administrative efficiency. The Internet offers possibilities to broaden the circle of participants, simplify the access and management of information and thus to create greater public control. Especially at the local level, online participation is an innovative way to link political decisions back to the affected citizens in between elections. In this way, politics can adapt to current social trends and become a closer representation of our individualized society. In conclusion, e-participation can be one step closer to the democratic ideal. Yet, democratic aspirations require careful consideration. Generally speaking, the higher the level of intensity, the higher the actual impact of participation on final political decisions. As a consequence, online participation has to respect constitutional principles, especially the municipal right to self-administration, human rights, the rule of law and the principle of equality. Citizens´ may obtain the role of experts, supervisors and providers of impulses, still, the state as *guardian of the common good* [48] has to make decisions which include common interests instead of singular interests. The key to successful e-participation is a mutual trust between citizens and politicians. Regulation can help to create legal certainty by clarifying authority and responsibilities of the state. Hence, legal rules can help to improve the relationship between citizens and the government. As (non-exhaustively) described in Sec. 2.1.2, *de lege lata* there are many

participation possibilities at the local level. Nevertheless, § 18 eGovG NRW is the only state law *expressis verbis* regulating minimal standards for informal online-participation. This first important step breaks ground for more detailed regulation by municipalities. Due to the right to self-administration and regional differences in Germany, it is adequate to leave further specification up to the cities. Further research will have to examine, which concrete rules need to be adopted and how they should be integrated in the German legal system.

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