

# **Towards an inclusive approach to e-Governance: A Case for Administrative Justice in South Africa**

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## **Abstract**

Impartial, fair and reasonable decision making by public institutions in South Africa as advocated for in administrative law, still faces significant challenges. In this paper, we propose a different approach to the implementation of the Provision of Administrative Justice Act. Based on previous research and government reports which highlight the lack of capacity within communities to participate in administrative decision making, this paper presents a theoretically informed approach for e-governance as a way of getting feedback and as a way of discussing existing services. Toulmin et al's schema of reasoning and Courtney's decision making paradigm form the theoretical basis of the framework. The process embedded in the framework can be facilitated by specially designed decision support systems which create a forum in which clarity can be obtained on service delivery problems and different perspectives on solving them can be elicited.

## **1. Introduction:**

Between 1948 and 1994 South Africa was governed under a policy known as apartheid. Apartheid, which literally means *apartness*, was a system of legalized and enforced segregation between races. In apartheid, decision making was highly autocratic and non-negotiable. Absolute authority centralized to a small minority resulted in a grossly inefficient, mismanaged and corrupt South African public service system. As a result of this period, significant divisions were created within society. These divisions had a considerable impact on the functioning of public service institutions, created tensions between different races and ethnic groups, and led to a low trust within society of public institutions (Askvik and Bak, 2005). Thus, although the first democratic election of 1994 and the 1996 constitution initiated a process of decentralization and increased accountability, they brought with them profound demands on the government as well as the citizens for radical transformation (Rakate, 2006). A number of legislations and policies have since been passed to redress this situation in South Africa.

The transformation of the public service formally began in 1995 with the release of the White Paper on the Transformation of Public Service (Republic of South Africa, 1995), hereafter abbreviated to WPTPS. The WPTPS established the institutional framework that could guide the introduction of new policies and the implementation of the new constitutional mandates. It was shortly followed in 1997 by the White Paper on Transforming Public Service Delivery, labelled as the Batho Pele White Paper (Republic of South Africa, 1997). Batho Pele, a Se-Sotho term meaning "People First", is based on eight national standards of consulting users of service, setting service standards, increasing access, ensuring courtesy, providing more and better information, increasing openness and transparency, remedying mistakes and failures and getting the best possible

value for money (South Africa, 2006). The Batho Pele White Paper is specifically aimed at promoting integrated and seamless public service delivery. These two policy papers set the stage towards radically transforming the previously dysfunctional system.

In this paper we draw attention to an act whose primary purpose is to promote fair and impartial decision making as part of service delivery by government administrators; the Promotion of the Administrative Justice Act (PAJA) (Republic of South Africa, 2000). The PAJA is the core legal framework that guides the Batho Pele government policy on public service delivery. PAJA states that everybody has the right to fair, lawful and reasonable administrative action, and that reasons should be given to them in cases where administrative action affects them negatively. As such it brings into effect the right enshrined in the Constitutional Bill of Rights to 'just' administrative action. However, the government has struggled to implement the PAJA since its inception in 2000 primarily citing capacity problems (Republic of South Africa, 2001, , 2002, , 2004, , 2005, , 2006, , 2007). We argue in this paper that a more theoretically informed implementation strategy could have a profound effect not only regarding the citizens' awareness of their rights and the taking of action accordingly, but also in terms of the capacity of the administrators to act in a manner adhering to the act. This finding is based on previous research on the use of Decision Support Systems (DSS) for the dissemination of information pertaining to citizen's rights as laid down in the PAJA (Twinomurinzi and Phahlamohlaka, 2006).

The main objective of this paper is to explore the theoretical arguments which can be made regarding the implementation of the PAJA and as such does not deal extensively with the details of the previous research which has been written up elsewhere (Twinomurinzi, H. and Phahlamohlaka, L.J, 2005; Alexander, P.M. and Phahlamohlaka, L.J, 2005; Wooding, T. and Phahlamohlaka, L.J, 2005). However, based on this theoretically informed framework we believe that a more informed practical implementation of PAJA will result. In this respect we explore the implementation of PAJA aided by DSS and reasoning processes.

In the rest of this paper we briefly explore the PAJA and the research project on which we build. We then (Section 3) describe the conventional approach to DSS and a more holistic approach which is needed if DSS are to be used to assist in the implementation of the PAJA. Within the DSS it is also important to explore how decisions are justified and supported. This process of reasoning also has implications for the implementation of the PAJA (Section 4). The implications of applying the new paradigm to DSS (Courtney, 2001) and using a schema of reasoning (Toulmin et al., 1979) in relation to the PAJA are then discussed in Section 5. Section 6 concludes this paper on how the implementation of the PAJA can benefit from taking a broad holistic view to decision-making around the PAJA.

## **2. The Promotion of the Administrative Justice Act**

Despite the evident heavy investments in promoting Batho Pele nationwide, public service delivery as a collaborative approach still remains a significant challenge (Harris, 2006, Legoabe, 2004, Government of South Africa, 2006, Government of South Africa, 2007). In most instances, both the public servants and the citizens do not know how to operationalise Batho Pele; both groups do not know how to translate these principles into day to day practices primarily because they lack the skills to do so (Deputy President,

2007) and because many citizens remain suspicious of the government (Twinomurinzi and Phahlamohlaka, 2005). Public service delivery hence remains the traditional one way communication channel from the government to the public. The collaborative paradigm prescribed by Batho Pele for government–citizen interactions remains a vague philosophical ideal. The specific case of the PAJA illustrates this.

The promulgation of the PAJA means that theoretically a South African citizen has the opportunity for their arguments or ‘their side of the story’ to be aired to public administrators before any decision affecting them is made. Once a decision is made which negatively impacts on a person, reasons in writing need to be given within 90 days if requested. The outcome should be that a person should know why administration has made the decisions they have, even if they do not agree with the outcome. For the administrator it implies that they must follow fair procedures when making decisions; explain the decisions they take; explain any internal appeal process that may exist within the department; explain that the applicant can ask a court to review the decision, and; lastly, that written reasons for the decision must be given if requested. The PAJA only relates to decisions which negatively affect people’s rights. This can be in terms of decisions taken that affect the individual directly, but also decisions affecting sections of the public, for example building a road through communal land. Thus the PAJA is fundamentally about decision making processes within a social environment and the rationale or reasoning behind those processes.

In terms of the process of decision making there are two main reasoning processes which take place. The first is in terms of the applicant having the capacity to air their own views and reason as to why they should be given the requested service. The second relates to the strengthening of the capacity of the administrator to give reasons for the decisions made. Interestingly in the documents which support PAJA (Government of South Africa, 2000, German Development Cooperation (GTZ) and Department of Justice/Justice College, 2002, Department of Justice, undated), though there is a clear process on how to make a challenge, most of the documents on decision making focus on the administrator giving reasons for their decisions rather than on the client giving their reasons for their decision on why they applied for that service. These two perspectives are now explored in further detail.

Under the PAJA a person can challenge decisions if the correct procedure was not conducted and as such can hold administrators accountable for decisions which negatively affect their lives. However, such requests for decisions must be in writing and within 90 days of the decision being made. Some enquiries will take place within the Department, for example, the Department of Home Affairs has an Appeal Board. If not, then the person can take the decision to court. Given the expense of this a number of alternatives are suggested by the Department of Justice: writing a letter to the relevant Minister or Director-General, finding NGOs, CBOs and Paralegals in the area that could assist, contacting the Public Protector in cases where corruption is suspected, using the Human Rights Advice Line, Legal Aid Board and Justice Centres. This assumes a persons’ capacity in terms of developing coherent arguments before the application is made and/or when contesting a negative decision which has been made.

From the administrators’ perspective fairly clear procedures are outlined for the administrator to follow in making a decision. These include:

- Before taking a decision the administrator must tell the people whose rights are affected what they plan to do and give them time to reply.
- After taking a decision, administrators must provide a clear statement on the decision made, information on any internal appeal and review process, and inform the person that they can request reasons for the decision.

Unlike the client there are guidelines available on the website (<http://www.doj.gov.za/2004dojsite/paja/new.htm>) on how the administrator should reason their decisions (German Development Cooperation (GTZ) and Department of Justice/Justice College, 2002) and the Draft Code of Good Administrative Conduct explains what is deemed good conduct (Department of Justice, undated). An example of a standard letter which could be used by an administrator to justify the decision made is given, though it is recommended that such standardised forms are not used. There are guiding principles given on what to include in such a written response. These include:

- A clear decision must be set out;
- Details of the person who took the decision must be given;
- Adequate reasons for the decision must be given; and
- Information must be provided on any legal remedies available.

Based on previous research by Twinomurinzi and Phahlamohlaka (2006), e-collaboration technology can be used to facilitate collaborative government-citizen interaction in the implementation of policy and to improve service delivery. Their work is based on an ongoing six year longitudinal interpretive research project into identifying and harnessing opportunities for sustained collaboration and interaction by communities through the use of web-based Group Support System tools within e-government contexts in South Africa (Twinomurinzi and Phahlamohlaka, 2006). Three years of this project have been completed. The preliminary results suggest that an e-collaboration approach, Collaboration Engineering using thinkLets, when used as an enabler in a role playing scenario which utilises practical examples, can lead to the buy in of government development innovations in communities through collaborative government-citizen interaction (Twinomurinzi, 2007, Twinomurinzi and Phahlamohlaka, 2006).

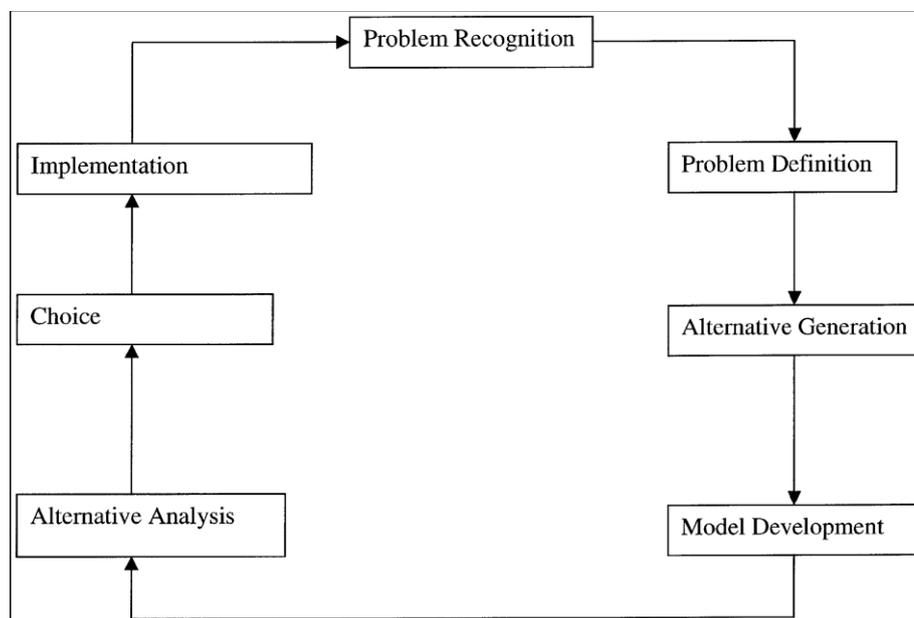
Three field locations in three different Provinces in South Africa were selected to carry out exercises using these Group Support Systems. These included; Siyabuswa in the Mpumalanga Province (hosted by SEIDET), Lebotloane in the North West Province (hosted by Leretlabetse Multi Purpose Community Center) and several Civil Society organizations (hosted by the University of Pretoria) in Gauteng. The sites were chosen in terms of availability of networked computers, proximity to the University of Pretoria and commitment from local leaders within the hosting institutions. Twenty participants from the local community were selected by the community leaders and comprised government officials, community leaders, students, pensioners, and social workers and those who were likely to attend. The formulation and implementation of the e-collaboration approach, Collaboration Engineering using thinkLets, occurred in these workshops.

What stood out from these research workshops was the little knowledge surrounding the PAJA and the lack of capacity to promote it. How to overcome these gaps using DSS is the focus of the on-going research. This paper broadens this research to investigate how theories relating to decision-making and DSS can inform e-collaboration within the Batho Pele philosophy for the improvement of service delivery in South Africa through collaborative government-citizen interactions. In this paper we argue that the research

requires an understanding of conventional approaches to DSS (Section 3) and the justification of decisions (Section 4).

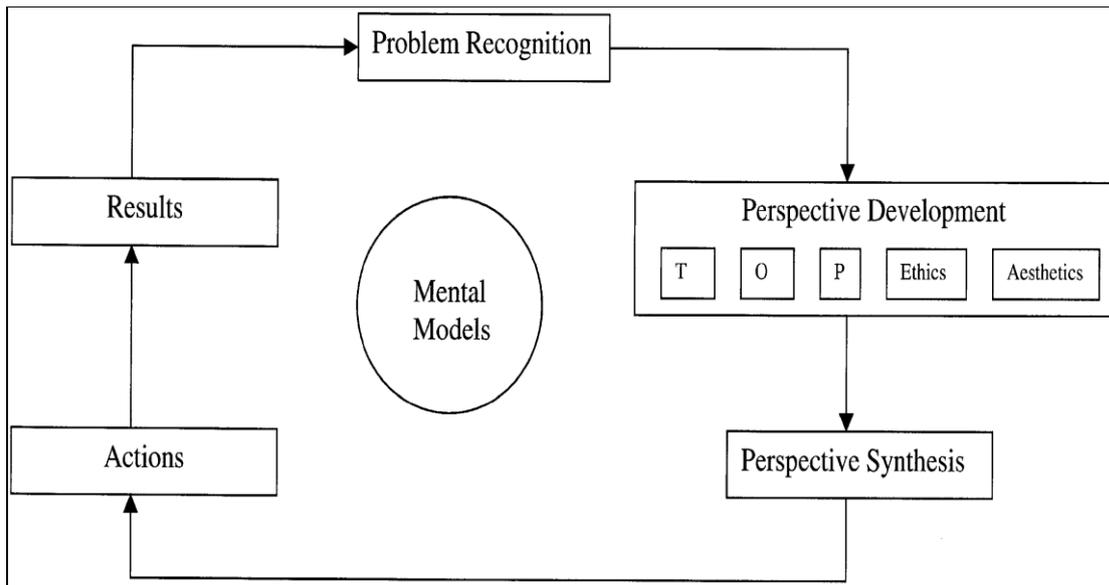
### 3. IS Supported Decision Making

IS researchers investigating DSS are increasingly becoming critical of the past a-contextual stance of DSS (Gopal and Prasad, 2001, Kock, 2005, Briggs et al., 2003, Dennis et al., 2001, Vreede, 2006). Courtney (2001) particularly believes that there is the need for a new paradigm for decision making within DSS as contexts are getting more complex and ill-structured. This is largely attributable to the global nature of business and the call for more ethical/socially responsible business practices. The implications of more ill-structured global decisions on DSS are that data from outside the organisation is required, often social data - data about people. Consequently, relational databases, flexible query languages and flexible interactive modeling systems are needed (Courtney, 2001).



*Figure One: The conventional DSS decision-making process  
(Source: Courtney, 2001, Fig. 2 p. 19)*

Courtney postulates that the conventional DSS decision-making process (illustrated in Figure One) is inadequate to deal with such complex problems as the conventional emphasis in DSS is on model development and problem analysis and consequently the reduction of the decisions to alternative technical/mechanistic solutions. Courtney argues that a more holistic approach to DSS is required where broad organisation and personal perspectives and ethical and aesthetic considerations can be included with the traditional technical perspective. This Courtney illustrates as follows (Figure Two):



*Figure Two: Courtney's New Decision-Making paradigm for DSS  
(Source: Courtney, 2001, Fig. 4, p31)*

The conventional approach to DSS would thus, move from problem recognition into problem analysis. However, Courtney's new decision-making paradigm does not move immediately from problem recognition into trying to 'model' the solutions, but to a process of developing multiple perspectives on the nature of the problem. Different tools and techniques can be used for this process. The mental modes determine what data and what perspectives we examine and how. These different perspectives can focus on different aspects or parts of a problem: Technical (T); Organisational and social (O); Personal and individual (P); ethical, and; aesthetics. This paradigm aims to:

"...recognize the connectedness of things in the universe, especially of complex social problems. The non-separability and irreducibility of elements in complex problems and issues is recognized. The development of multiple perspectives is the very core of UST. A critical aspect of developing multiple perspectives is open, honest, effective dialogue among all relevant stakeholders in the problem involved. Managers in such an environment must be careful to respect the rights and viewpoints of the parties involved, and be open and honest themselves in order to gain the trust of those who will be affected by the decision" (Courtney, 2001 p.29).

Applying this multiple perspective approach requires the development of a cooperative environment – moving from viewing organisations as machines to viewing them as communities in which people learn from one another (Addleson, 2000 quoted in Courtney, 2002, p.35). According to Addleson five axioms for the development of a learning community are required:

- Foster collaborative relationship between people
- Conviction and commitment of people to the community
- People must be self motivated from ambitions, work ethic and responsibility to one another
- Organisational boundaries are people's boundaries with other people
- Management is situational – conflicts and relationships need to be managed. (Addleson, 2000 quoted in Courtney, 2002, p.35)

This makes the use of conventional approaches to DSS decision-making inappropriate in terms of e-governance initiatives and more participatory approaches to policy implementation. Courtney’s new approach seems to offer a more feasible alternative. Part of this decision-making process and the perspective synthesis concerns the justification of decisions made or views taken. Toulmin et al.’s (1979) schema of reasoning can assist here.

#### 4. A schema of reasoning

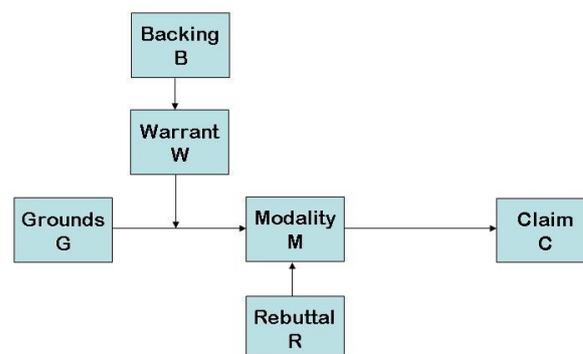
Toulmin et al. (1979) illustrate a technique which can be used to prepare individuals and groups of decision makers for the process of justifying a decision. They suggest the commencement of an initial process of ‘inoculation’ - exposure to justifying decisions which can assist in reducing this anticipation anxiety. They then identify six elements that can be found in any wholly explicit argument:

- Claims (What is the precise assertion being made?)
- Grounds (What is the foundation for making people believe the assertion?)
- Warrants (What guarantees or authorisation can be drawn upon to support the claim based on these grounds?)
- Backing (What general information can support this warrant?)
- Modal qualifications (What are the possible restrictions or limitations to the claim?)
- Possible rebuttals (What are the possible refutations that could be given to this claim based on this argument?)

The logical structure of the argument can be summarised as:

“Given grounds, G, we may appeal to warrant, W, (which rests on backing, B), to justify the claim that C – or, at any rate, the presumption (M) that C – in the absence of some specific rebuttal or disqualification (R)” (Toulmin et al., 1979, p.78).

This structure is illustrated by Toulmin et al (1979) in Figure Three.



*Figure Three: Logical structure of an argument  
(Source: Toulmin et al, 1979, Fig 6-5, p.78)*

Toulmin et al's (1979) justification for decisions and Courtney's proposed approach to decision-making can be used to theoretically inform how the PAJA should be implemented. As discussed above, it is clear that the dissemination, understanding and implementation of the PAJA is far from ideal.

## **6. Discussion**

In terms of the PAJA the conventional approach to DSS decision-making will not be useful in that government service delivery is complex. Paradigm shifts in the philosophy of service delivery, a human rights approach to governance, and emphasis on participatory governance, especially at local level means that decisions are being made in a complex and changing environment which is fundamentally about social processes and fostering cooperative environments. Thus the implementation of PAJA must recognise that DSS can assist in some way, but only if they form part of a broader systems approach to its implementation. In terms of decisions impacting on society, as Phahlamohlaka and Roode (2001) note, conventional decision theory focuses on limited cognitive information processing capability of individual decision makers and not on the social aspects of the decision making process. In this sense Courtney's decision-making paradigm is a suitable paradigm in which to view the implementation of the PAJA. This also has implications on the decisions made are justified in such an organisational context.

In general, all arguments potentially need to be justified in some way, whether this is internally to oneself or externally to other parties. This can often cause anxiety (Phahlamohlaka and Roode, 2001) in the anticipation of the need to provide such a justification. Anxiety is heightened especially around decisions which are based on tacit knowledge, as it is often assumed that since the decision maker is accountable she/he can articulate the reasons for the decision. This may not be the case and so these expectations further increase anxiety (Phahlamohlaka and Roode, 2001, Beck, 1992, Giddens, 1991). Thus to assuage the similar errors caused by shrouded decision making typical of apartheid and to move towards a transparent approach to administrative decision making, this focus on the reasoning process is required for two reasons. Firstly, the constitution, which is the highest law in South Africa, mandates in Section 33 that all decisions taken by government must be lawful, reasonable and procedurally fair. Secondly, as discussed above in the PAJA any decision taken, or the lack of a decision, by Government that has a negative effect must be followed by written reasons if requested for. The process of reasoning and explanation can cause anxiety for government officials.

In terms of the decision making process there is little focus on the reasoning process that would need to be formed in terms of explaining the decision made either in the PAJA itself or in the guidelines on its implementation. Toulmin et al.'s (1979) schema could be used here. However, simply rewording the letter into the schema and providing standardised responses would not be useful either. What would be required is training on developing this critical and systems thinking approach. Given that both the decisions made by the client and the administrator need to be justified to an external party Toulmin et al's (1979) schema could be useful here. However, the schema would also be of value in the process of deciding on alternative decisions which could be made if Courtney's new decision-making paradigm for DSS was used.

Therefore, given the changing environment and the ethical and social nature of the decisions covered by the PAJA Courtney's model (2001) looks attractive. Toulmin et al's

(1979) schema of reasoning seems a more capacitating approach for the administrators than trying to develop the reasoning skills through sample letters. Such a schema of reasoning would commence once a problem is recognised (i.e. a decision which adversely affects the persons rights has been made), but rather than trying to ‘model’ the solutions Toulmin et al’s (1979) schema could be used to develop multiple perspectives. In much the same way as Courtney (2001) suggests the use of cognitive maps, influence diagrams and entity-relationship diagrams Toulmin et al’s (1979) schema of reasoning could be used to develop these perspectives. Figure Four summarises how the PAJA, the new decision-making paradigm and the schema of reasoning are interconnected.

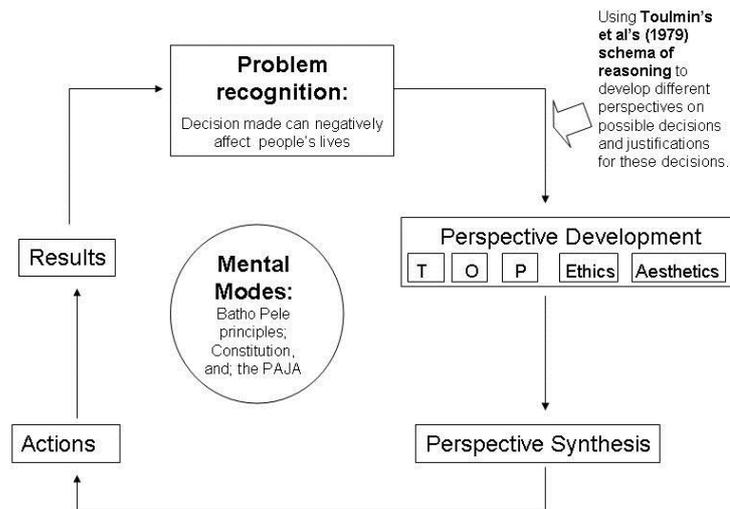


Figure Five: The PAJA, Courtney’s new paradigm of decision-making and Toulmin et al’s schema of reasoning.

## 7. Conclusion:

The PAJA addresses discursive action, where an agreement is needed to resolve a difference. However, for an inclusive and collaborative approach to service delivery as instantiated in the *Batho Pele* White Paper there should also be mutual/shared understanding and agreement on the solution. This goes beyond justifying a decision. In this case communication is the means of not just finding out what administrators have previously decided or learned, but a process in which opinion and consensus is created by the process of debate itself. To do this people must have the capacity and space/place to express themselves openly and freely and must accept the outcome of rational argument – requiring all communication in writing in a traditional orally based culture does not achieve this. For communicative action to occur, there is the need for a common understanding of terms, visions and cultural practices. Communication involves much more than the language used between actors, and incorporates a complex network of social relationships (Habermas, 1987). The process of communication will not remove all the barriers, but the attainment of critical reflection of individuals, through which emancipation can occur.

*The underlying utopia is the emancipatory idea of a community of free and self-responsible citizens coming together and seeking to achieve consensus on matters of public (non-private) concern by means of argumentative, oppression-free will-formation and democratic majority vote. (Ivanov, 1991, p.3)*

Courtney's new paradigm on decision-making can be used to explore how the generation of multiple perspectives can foster the creation of the inclusive e-Governance or collaborative environment which we need to achieve if PAJA in particular, and Batho Pele in general, are to be implemented to lead to improved public service delivery.

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