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New governance, the solution for active European citizenship? Or the end of citizenship?

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Summary

With its focus on decentralised participation, new governance may appear as strengthening active citizenship. It may, therefore, provide a solution for European citizenship that until now has mainly been defined as a rights-based status. However, while new governance may contribute to the participatory dimension of citizenship it may be at odds with the rights and the identity dimension of the concept. The article shows the difficulties of the European political debate to link the idea of participatory governance to the concept of European citizenship. It subsequently analyses how new governance relates to the three constitutive elements of citizenship: participation, rights and belonging.

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I. Introduction*

European citizenship has been mainly defined and debated as a rights-based status, while its participatory dimension has been largely overlooked. The debate on new governance in the EU might, therefore, provide an opportunity to rethink active citizenship in the Union. ‘New governance’¹ is often presented by policy-makers as particularly ‘participatory’ in nature. Some normative accounts of new modes of governance, such as ‘democratic experimentalism’, equally suggest a decentralised form of policy-making that would bring decision-making on the public good closer to the daily experience and participation of citizens. From this perspective new modes of governance may appear as reinvigorating citizenship, broadening citizens’ participation beyond their four or five yearly ‘one shot’ approach to the electoral process.

In the first part of the paper I will look at how European citizenship has mainly been defined in political and academic debates as a rights-based status. The participatory features of European citizenship have been defined mainly with reference to parliamentary representation. Yet, the new governance debate brought the more complex participatory features of European governance to the fore. However, this debate shuns the concept of citizenship. Neither has the Constitutional Treaty bridged the distance between participatory governance and citizenship, despite the introduction of the principle of participatory democracy.

In the second part of the paper I will analyse the potential and difficulties of new governance as a solution for active European citizenship. I will argue that the debate on new governance indeed helps to acknowledge the diversity of participation in European policy-making and may support a broader conception of active European citizenship, beyond electoral participation. However, while new governance may strengthen the participatory dimension of citizenship, it does often not sit comfortably with the other two constitutive elements of citizenship, namely rights and identity.

II. European citizenship and ‘participatory governance’, two different worlds

II.1 European citizenship: participation without new governance?

II.1.1 European citizenship: a debate on rights and belonging

Citizenship is built on three elements: a set of rights and duties, participation, and identity. As David Held puts it: ‘citizenship has meant a reciprocity of rights against, and duties towards, the community. Citizenship, has entailed membership, membership of the community in which one lives one’s life. And membership has invariably involved degrees of participation in the community’.² These three constitutive elements of citizenship are interlinked, although they can be stressed differently according to the perspective. Thus the rights dimension is mainly identified with a liberal account of citizenship, participation with a republican account,

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¹ I rely on the broad definition of new governance as set out in the introduction to this special issue.

² David Held (1991), ‘Between State and Civil Society: Citizenship’ in Andrews (ed), *Citizenship*, London: Lawrence and Wishart, p.20. Wiener talks about ‘the three historical elements of citizenship: rights, access and belonging’. Antje Wiener (1998), *European Citizenship Practice*, Oxford: Westview Press, p.26.

and belonging with a communitarian one.³ It has generally been argued that European Union citizenship until now has been based mainly on the liberal conception of citizenship – i.e. conceiving of this concept as a formal, legal right-bearing status rather than as a participatory political status.⁴

The idea of European citizenship goes back to the 1970s when European politicians aimed at creating an identity for the EC/EU and its citizens, in terms of a ‘passport union’ and special rights for Europeans – and particular workers – crossing borders within Europe.⁵ European citizenship was conceptualised, above all, as ‘market citizenship’, acting as participant in or as beneficiary of the common market,⁶ and thus addressed citizens in their capacity of workers, professionals, service providers and their families, moving across borders.

However, with the introduction of the concept of Union citizenship in the Maastricht Treaty, citizenship enters into the high spheres of symbolic politics to strengthen support for Union institutions and policies and create allegiances to what is no longer ‘merely’ an economic community but ‘an ever closer Union’ (art. 1 TEU).⁷ The status of Union citizenship extends automatically to *all* nationals of the Member States of the EU, and is thus no longer limited to the economically active within the common market. The non-exhaustive list of citizenship rights set out in Articles 17-22 EC are well-known; to start with – and building strongly on the *acquis communautaire* - the rights to residence and free movement. And further: the right to vote and stand as a candidate at municipal and European parliamentary elections in the Member States of residence; the right to diplomatic and consular protection when on the territory of a third country on the part of any Member State; the right to petition the EP, to apply to the European Ombudsman, and to write to the institutions in their own (Community) language and receive an answer in that language.

European citizenship has since become a framing concept of European institutional, political and legal discourse, to the extent that one could talk about a ‘citizen inflation’.⁸ The debate has focused on both the content of European citizenship as a rights-based status – what is the added value of the Maastricht provisions? What should European citizenship include? – and on the question of belonging – namely, who should the European citizens be.

As a rights-based status, the concept of European citizenship has influenced the jurisprudence of the Court of Justice to ensure the equal treatment of the nationals of the Member States when they are resident in, or visitors to, another Member State, and thus to extend the non-

³ Richard Bellamy (2004), ‘Introduction: The Making of Modern Citizenship’, in Richard Bellamy, Dario Castiglione and Emilio Santoro (eds), *Lineages of European Citizenship*, Houndmills: Palgrave, p.7.

⁴ G. de Búrca (1996), ‘The Quest for Legitimacy in the European Union’, 59 *The Modern Law Review*, p. 358; Gerard Delanty (1998), Review Essay. Dilemmas of Citizenship: Recent Literature on Citizenship and Europe’, *Citizenship Studies*, vol. 2, No. 2, p.355; Richard Bellamy, Dario Castiglione and Jo Shaw (2006), ‘Introduction: From National to Transnational Citizenship’, in Richard Bellamy, Dario Castiglione and Jo Shaw (eds), *Making European Citizens. Civic Inclusion in a Transnational Context*, Houndmills: Palgrave, p.9.

⁵ Antje Wiener (2003), ‘Citizenship’, in Michelle Cini (ed), *European Union Politics*, Oxford: Oxford University Press, p.407.

⁶ Michelle Everson (1995), ‘The Legacy of the Market Citizen’, in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union*, Oxford: Clarendon Press, p.73.

⁷ Carlos Closa (1992), ‘The concept of citizenship in the Treaty on European Union’, *Common Market Law Review*, 29, 1137-69; Jo Shaw (1997), ‘European citizenship: the IGC and beyond’, *European Integration online Papers*, Vol.1, No.3.

⁸ Jean Vogel (1999), ‘Le Parlement européen face à l’émergence d’une société civile européenne’, in Pascal Delwit, Jean-Michel De Waele et Paul Magonette (eds), *A quoi sert le Parlement européen?*, Bruxelles: Editions Complexe, p. 204.

discrimination principle beyond the group of economically active migrants.⁹ At the same time, the citizenship concept has stirred the development of a rights discourse by political actors and civil society organisations in subsequent constitutional reforms. At the 1996 Intergovernmental Conference many civil society organisations made proposals ‘to give more flesh to the idea of citizenship as enshrined in the Maastricht Treaty’.¹⁰ Despite not much success at the 1996 IGC, the rights discourse and the activity of citizen organisations came to a height and proved very successful during the drafting of the Charter of Fundamental Rights of the EU. The post-Maastricht period has not only been characterised by an intensification of a citizenship rights discourse by the Court and by political and civil society actors, but also by a debate on who can or should be a European citizen. In fact, the only change brought to the EC Treaty’s citizenship provisions at Amsterdam was the specification that ‘citizenship of the Union shall complement and not replace national citizenship’. The Danish no vote had awakened further sensitivity to the identity dimension of citizenship. Yet, while the Member States stress European belonging as dependent on national belonging, much of the civil society organisations active at the European level have been pleading to extend rights to all persons *resident* in the EU. Often strongly engaged with the language of fundamental rights, for these organisations it is difficult to embrace a notion of citizenship that is exclusionary. This tension is ever more present in the European debate since NGOs have paid increasing attention to the issue of third country nationals as the EU acquired more competencies in this field.¹¹

Given the way citizenship has been conceptualised in the Maastricht Treaty and the way debate has developed over the last 15 years, one can agree with Richard Bellamy that EU citizenship has much of the form and some of the substance of the liberal, rights-based, model, while at the same time it remains largely framed – some would say compromised – by a communitarian notion of belonging. What seems to be missing, though, is a strong conceptualisation and debate on the participatory dimension of European citizenship. As Bellamy puts it: ‘republican notions of participation remain the Achilles heel of EU citizenship.’¹²

II.1.2 Active citizenship: conceptualisation and practice

While the right-bearing status of citizenship and the question of belonging have attracted much debate, the Maastricht Treaty provisions did include a participatory dimension to Union Citizenship. Europeans would no longer merely profit from rights as market citizens but they participate in decision-making of what is now a political Union. Yet, this participatory dimension has been conceptualised in a restrictive way, namely as participation through voting in the electoral process of representative democracy, complemented by a right to petition to the

⁹ E.g. Case C-85/96 *Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-1693; Case C-209/03 *R. v. London Borough of Ealing and Secretary of State for Education and Skills, ex parte Bidar*, 15 March 2005. See also Catherine Barnard (2006), ‘Solidarity and New Governance in Social Policy’, in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US*, Oxford: Hart, p.153-178.

¹⁰ Vogel, *supra* note 8, at 208. This has been said to be an illustration that ‘citizenship practice has become a central aspect of constitutional politics from below’. Antje Wiener and Vincent Della Sala (1996), ‘Constitution Making and Citizenship Practice – Bridging the Democracy Gap in the EU?’, *Journal of Common Market Studies*, Vol.35, No.4, p.595-614.

¹¹ Although Member States retain the exclusive competence to decide on the criteria for nationality (and thus indirectly for EU citizenship), the European integration process and *acquis communautaire* has led to convergence in these criteria. Moreover, recent EU intervention to deal with third-country nationals further strengthens this development. See Karolina Rostek and Gareth Davies (2006), ‘The Impact of Union Citizenship on National Citizenship Policies’, *European Integration online Papers*, Vol. 10, No.5; <http://eiop.or.at/eiop/texte/2006-005a.htm>.

¹² Bellamy, Castiglione and Shaw (2006), *supra* note 4, at.9.

EP. The right to apply to the European Ombudsman (EO) opens up the participatory dimension of citizenship towards interaction with the administration.¹³ Yet, being an *ex post* control on maladministration this can hardly be called a particularly strong conceptualisation of participatory governance. What is lacking, is a far broader conceptualisation in which participation in a multi-level polity, through different levels of government and modes of governance, would aim at the citizenship ideal of self-governance.

The regular Commission Reports on Citizenship of the Union¹⁴ –following the obligation of Article 22 EC- are illustrative of this narrow conceptualisation of the participatory dimension. The reports deal with the participatory dimension of citizenship only with regard to the explicit rights established in Articles 18-22 EC. Moreover, acknowledging that few people have made use of these rights – in particular voting in EP elections in another Member State than their own – the reports stress the need for further initiatives to make European citizens aware of their rights. The need to inform European citizens about their rights (and apparently not about their duties) in order to strengthen the legitimacy of the European construction has since become a central feature of the EU institutions' approach to citizenship. In EU official documents citizenship seems often conceptualised as a set of rights of which the beneficiaries still live in ignorance or...ingratitude.

Pietro Costa makes in this context an interesting historical comparison between national and European citizenship.¹⁵ The symbolic dimension that rights had always embodied in past centuries seems to have lost strength and visibility in the context of a European integration that appears as a top-down process of institutional engineering. The “struggle for rights” was inseparable from a movement of people and ideas willing to “wager” on a future order, capable of opening up possibilities impeded by the existing governments. Instead, European citizenship confirms existing rights, or provides a regulatory framework shaped by an elite who then attempts to engage the citizen in acknowledging it. Even the symbol-laden Charter of Fundamental Rights has not captured the hearts of the European citizens, even less was it the outcome of a popular struggle for rights at the European level. From this perspective, the enthusiasm about the engagement of civil society organisations in the post-Maastricht constitutional reforms should be tempered. To conclude that ‘citizenship practice has become a central aspect of constitutional politics from below’¹⁶ may be too optimistic. For sure, civil society involvement in Treaty reform post Maastricht, and in particular through the two Conventions, constitutes a shift away from the closed diplomatic exercise of previous IGCs. However, often it seems more to do with ‘activated citizenship’ than with active citizenship, namely European decision-makers try to activate civil society top-down to ‘sell the product’.¹⁷ In particular since the difficult ratification process of the Constitutional Treaty a myriad of initiatives have been taken which seem rather to attempt to bring the citizen closer to

¹³ The right to use one's own language, if an official EU language, in the interaction with EU institutions may facilitate such interaction but does not as such provide any participatory procedure.

¹⁴ First report on Citizenship of the Union (COM(93)0702final), Second report (COM(97)230 final), Third Report (COM(2001)506final).

¹⁵ Pietro Costa (2004), ‘From National to European Citizenship: A Historical Comparison’, in Bellamy, Castiglione and Santoro, *supra* note 3, at 220.

¹⁶ Wiener and Della Sala, *supra* note 10..

¹⁷ The assessment of participation in the first Convention has been more positive than regarding the second Convention. Deloche-Gaudez, for instance, notes that although ‘European citizens did not take part in the exercise in any great numbers’, the consultation of civil society organisations via hearings and online contributions contributed to the Charter being seen as representative of the common European values. See F. Deloche-Gaudez (2001), ‘The Convention on a Charter of Fundamental Rights: A Method for the Future?’, Notre Europe Research and Policy Paper No.15.

Europe than Europe closer to the citizen. Already during the IGC, the ‘Futurum’ website functioned rather as a first step to sell the product than as a tool to influence the drafting process. During the same period a ‘Community action programme to promote active European citizenship 2004-2006’ (Council Decision 2004/100/EC of 26 January 2004) was adopted. The programme provides funding for associations and bodies pursuing aims of general European interest related to active European citizenship, by financing meetings and debates between citizens on themes of European interest, discussion and education projects and the dissemination of information on Community action. A new website entitled ‘A Constitution for Europe: 1000 debates on Europe’ currently lists more than 300 debates already organised around the Constitutional Treaty. In addition, a new ‘Debate Europe’ website has been launched in March 2006, engaging also in broader European debates beyond the constitutional issue. This ‘broad and intensive debate on European policies’ is the objective of the Commission’s Plan-D for Democracy, Dialogue and Debate which would have to ensure that any vision of the future of Europe is built on citizens’ needs and expectations.¹⁸ Although the Commission claims that Plan-D is not a rescue operation for the Constitution, the programme has explicitly been adopted in response to the European Council’s request to introduce a ‘period of reflection’.

To recapitulate, since its introduction in the Maastricht Treaty the participatory dimension of European citizenship has mainly been thought of in terms of electoral participation. In addition, the process of subsequent Treaty reforms has stirred participation as a constitutional practice. Yet, such active (or rather activated) citizenship as constitutional practice seems at least as much to do with selling Treaty reform than ensuring it is the outcome of a bottom-up process. Moreover, while most EU documents and initiatives on citizenship now focus on how citizenship practice would create belonging and support for the European integration process through broad debate on European issues, active citizenship as a daily governance practice is not envisaged.¹⁹ In EU official documents, citizenship in its participatory dimension is mainly about electoral participation and about stimulating a broad public debate that would ensure support at the grand moments of constitutional reform. This does not imply that participation in the daily governance of the European Union is not part of the EU’s official discourse or that it has not been the object of particular initiatives. Yet, such discourse – as I will argue in the following section – has not been framed in terms of European citizenship.

II.2 New governance: participation without citizenship?

Whereas European citizenship has been thought of above all as a rights-based status and its participatory dimension mainly been conceptualised in terms of electoral participation and ‘awareness raising involvement’ of this rights status, a broader debate on participatory governance and citizen involvement has taken place at another level. In particular the European Commission – together with the European Economic and Social Committee –²⁰ has developed since the end of the 1990s a discourse on participation in European policy-making beyond the traditional route of parliamentary politics. The Commission White Paper on European Governance²¹ has taken a central place in this debate in an attempt ‘to open up policy-making to make it more inclusive and accountable. A better use of powers should connect the

¹⁸ Commission Communication, ‘The Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate’, COM (2005) 494 final, p.2.

¹⁹ Plan-D does not include a single reference to the White Paper on European Governance.

²⁰ On the institutional interests of these two institutions to develop such a discourse, see S. Smismans (2003), ‘European civil society: shaped by discourses and institutional interests’, 9 *European Law Journal*, 482-504

²¹ COM (2001) 428 final, 25 July 2001.

EU more closely to its citizens and lead to more effective policies.’ Better involvement is looked at by ‘reaching out to citizens through regional and local democracy’, but above all by increasing relations with ‘civil society’, which in the words of the White Paper, ‘does not only include NGOs but also trade unions and employers organisations, professional associations, charities, grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.’ Moreover, ‘broader involvement’, according to the White Paper, also relates to consultative structures and tools that may also include profit-seeking organisations, scientific experts and representatives from national administrations.

The White Paper on European Governance has triggered several follow-up initiatives, often dealing with issues of participatory governance, such as General principles and minimum standards for consultation of interested parties by the Commission;²² Principles and guidelines on the collection and use of expertise by the Commission;²³ a Communication on a permanent dialogue with associations of regional and local authorities,²⁴ and an Action plan “Simplifying and improving the regulatory environment”,²⁵ including the option for self-regulation and co-regulation.²⁶

Moreover, the White Paper and its follow-up are not the only initiatives through which the Commission and the EU more generally engages with, and supports discourse for, participatory governance. In fact, as the Commission also intended to set out its institutional priorities²⁷ with the White Paper, participatory governance has been defined mainly in relation to the Community Method, thus using the ‘legitimacy-credit’ of civil society consultation to strengthen the Commission’s institutional position.²⁸ This has not impeded the language of participatory governance to flourish also in other modes of governance. Already since the end of the 1980’s, the Commission has encouraged the principle of partnership in structural funds policy. Initially thought of as a requirement to involve the public authorities at the regional and local level in structural policy, the concept has been broadened to a requirement for more extensive public-private partnerships at these levels.

The language of decentralised participation has also been promoted especially in the context of the Open Method of Coordination. The Lisbon summit defined the OMC procedure as characterized by ‘a fully decentralized approach [that] will be applied in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of

²² Commission Communication “Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final.

²³ Commission Communication on the collection and use of expertise by the Commission: principles and guidelines, COM (2002) 713 final.

²⁴ COM (2003) 811 final.

²⁵ Commission Communication on an Action plan “Simplifying and improving the regulatory environment”, COM (2002) 278 final.

²⁶ The White Paper has also led to other governance initiatives in which the participatory dimension was less apparent, such as a communication on impact assessment (COM (2002) 276 final), and a framework for regulatory agencies (Com (2002) 718 final). For an overview of the initiatives, see Commission, Rapport sur la gouvernance européenne (2003-2004), Document de travail, SEC(2004)1153.

²⁷ D. Wincott (2001), ‘Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union’, 39 *Journal of Common Market Studies*, 897-911; A. Føllesdal (2003), ‘The Political Theory of the White Paper on Governance: Hidden and Fascinating’, 9 *European Public Law*, 1.

²⁸ K. Armstrong. (2002), ‘Rediscovering Civil Society: The European Union and the White Paper on Governance’, 8 *European Law Journal*, 105-126. S. Smismans (2003), *supra* note 20, at 490.

partnership’.²⁹ OMC guidelines and reports have since propagated decentralised participation, to which the Member States and decentralised actors have replied with variable success.³⁰

Another central issue on the new governance agenda, namely the role of agencies, has equally dealt with aspects of participation, although the issue of civil society involvement has mainly been debated in the context of certain agencies rather than others.³¹ Moreover, the language of ‘broadening participation’ has been taken up by some agencies themselves³² rather than been a central feature of the general design of European agencies.³³

What is common to all the documents in the ‘new governance debate’ – from the White Paper and its follow-up to the language of all the institutions involved in these new modes – is a focus on participation through functional intermediaries and an absence of the concept of citizenship.

What the governance debate mainly focuses on is not direct citizen participation, but functional representation, i.e. representation via associations and interest groups. The language is one of civil society (organisations), concerned interests, interested parties and stakeholders. Furthermore, these documents occasionally talk about the ‘citizen’ or ‘the public at large’, mainly in terms of European policy-making having to be brought closer to the citizen and to reflect the concerns of the public at large, but the concept of citizenship is entirely absent. There is, thus, a gap between the official discourse on European citizenship – conceived as mainly a rights-based status, with a limited participatory dimension focused on electoral participation – and the language of participatory governance in the new governance debate, where participation by intermediaries is seen as contributing to EU legitimacy but not defined as a contribution to more active citizenship.

II.3 The (missed) constitutional promise; linking citizenship and governance through participatory democracy?

One might have thought that the drafting of the Constitutional Treaty would have created the occasion to link citizenship to the by then popular debate on ‘participatory governance’. The

²⁹ Presidency Conclusions, Lisbon European Council, March 23-24, 2000. At <http://europa.eu.int/council/off/conclu/mar2000/index.htm>

³⁰ C. Barbier, C. de la Porte and P. Pochet, European Briefing, *Journal of European Social Policy*, Vol. 12 (2002), No. 3, p. 242; S. Smismans, ‘EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?’, EUI Working Paper, at <http://www.iue.it/PUB/law04-1.pdf>; J. Zeitlin and P. Pochet (eds) (2005) *The Open Method of Co-ordination in Action*, Brussels: Peter-Lang; Nicole Kerschen (2005), ‘The Social Partners in the European Employment Strategy. Specific Guidelines and National Action Plans for Employment’, in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?* Brussels: Bruylant.

³¹ See in particular in relation to the European Food Safety Authority, Damian Chalmers (2003), ‘“Food for Thought”: Reconciling European Risks and Traditional Ways of Life’, *The Modern Law Review*, Vol.66, No.4, p.523-562; and Laurie Buonanno (2006), ‘Politics versus science: Appointing competency in the European Food Safety Authority and the European Commission’, in David Vogel and Chriss Ansell (eds), *Why the Beef? The Contested Governance of European Food Safety*, MIT Press.

³² Some information agencies, such as the Bilbao Agency for Health and Safety at Work, have developed a participatory discourse in terms of being a ‘networking agency’. See S. Smismans (2004), *Law, Legitimacy and European Governance. Functional Participation in Social Regulation*, Oxford: Oxford University Press, p. 277-281.

³³ In the Commission Communication setting a framework for regulatory agencies (COM (2002) 718 final), for instance, the issue of civil society participation is not mentioned, which can be read in the light of the White Paper’s tendency to situate civil society involvement under the Community Method.

Constitutional Treaty has, in fact introduced an article (I-47) on participatory democracy under the title of ‘the democratic life of the Union’:³⁴

1. The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action
2. The Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.
4. No less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizens’ initiative.

However, it is not clear how participatory democracy relates to European citizenship. On the one hand, the article on participatory democracy is strongly inspired by the governance debate as developed since the Commission White Paper.³⁵ The idea is mainly that of a consultation process that is efficiency-driven but transparent and involves above all civil society organisations rather than individual citizens. While the first paragraph requires the Institutions to give also citizens – ‘by appropriate means’ - the opportunity to make known and publicly exchange their views, the more demanding ‘dialogue’ and ‘consultation’ provisions of paragraph 2 and 3 address only ‘representative associations’, ‘civil society’ and ‘parties concerned’. Even in the latter case, the Commission retains discretion in carrying out consultations with ‘parties concerned’ – rather than with THE parties concerned. Participatory democracy seems thus more to do with efficiency-driven (and accountable/transparent) administration than with bottom-up rights-based active citizenship. In fact, the idea that ‘every *citizen* shall have *the right* to participate in the democratic life of the Union’ is formulated in the preceding article, namely the one regarding representative democracy. This confirms the dominant tendency in which citizen participation rights refer to voting in elections, whereas participatory democracy is the vague domain of non-rights-based involvement of civil society organisations rather than of citizens. Similarly, the phrase that ‘decisions shall be taken as openly as possible and as closely as possible to the citizen’ is placed under the heading of representative democracy. It should therefore be seen as a request to respect subsidiarity in territorial terms ensuring accountability through parliamentary assemblies at the lowest possible level, rather than as a request for decentralized direct citizen participation. In this context, the new right of a citizen initiative, provided in the fourth paragraph of the article on participatory democracy, comes as a surprise in that it provides clearly a participation right for citizens. In fact, the provision appeared rather accidentally and late in the drafting process, and it remains to be seen to what extent it adds something substantial to what is already possible via the petition right to the European Parliament.³⁶

³⁴ I have described elsewhere in more detail how this principle was introduced and amended during the drafting of the Constitutional Treaty. S. Smismans (2004) ‘The constitutional labelling of “the democratic life of the EU”: representative and “participatory” democracy’, in Andreas Follesdal and Lynn Dobson (eds), *Political Theory and the European Constitution*, London: Routledge, p.122-138.

³⁵ The article, though, makes clear that participatory democracy is not only a requirement for the Commission, since it extends the principle in its first two paragraphs to all Union Institutions

³⁶ Smismans (2004), *supra* note 34, at 135.

On the other hand, the citizenship article (Article I-10) has not been substantially changed and does not include any reference to participatory democracy. The participatory dimension of citizenship still refers to electoral participation, the Ombudsman and petitioning the European Parliament. It is particularly surprising that the citizen's initiative has not been included in the citizenship article. Ironically, the petition right – open to all residents – is included in the citizenship article, whereas the citizen initiative – limited to nationals of EU Member States – is not.³⁷ Neither is participatory democracy explicitly mentioned under the 'citizens' rights' set out in part II of the Constitutional Treaty³⁸ (the Charter of Fundamental Rights), although some of the 'citizens' rights', such as right to good administration and right to access to documents can be considered as strongly contributing to participatory governance (see below).

III. Can new governance and citizenship be reconciled?

While the European institutional debate has conceptualised European citizenship in a restrictive way in its participatory dimension, the new governance debate has paid attention to the multiplicity of participatory patterns in European governance but without this leading to reconceptualising citizenship. What makes it so difficult to conceptualise participatory governance as a way to strengthen active citizenship? In this part of the paper I will first analyse how new governance does broaden our conceptualisation of participation, to then crucially highlight how difficult it is to reconcile it with the other two constitutive elements of citizenship, namely rights and identity.

III.1 A broader concept of participation: Political, administrative and governance citizenship

The most traditional way to conceive of the participatory dimension of citizenship is in terms of social movements struggling to obtain rights – 'participation for rights'- from civil to political and social rights. In addition – and as a consequence – citizens have political rights – 'participation rights'- in terms of voting in and standing for elections, and, in some countries by expressing their preferences on major issues via referenda. In this most traditional view, participation happens at the grand (revolutionary) moments of constitutional design, and every four years in elections. In between, civil society appears to have a latent existence in the background. As shown above, EU citizenship has mainly been defined in such a traditional conception of political rights, to include electoral participation (and the referendum inspired tools of petition to the EP, and the 'citizens' initiative') and 'citizens' activation' at the grand constitutional moments.

However, a broader interpretation of active citizenship would aim at the ideal of self-governance through enhanced citizen participation in the daily practice of multi-level governance. A first step in this direction is to conceive of the citizens' interactions not only with their parliamentary representatives, but also with their administration. Administrative lawyers, traditionally concerned with defining the relation between citizen and administration in terms of rights and duties, are well placed to do this exercise. Also at the European level, far from the high political debate and 'big constitutional moments', administrative law has developed rights and principles allowing citizens interaction with the European administration. Francesca Bignami has described the process in terms of 'three generations of participation

³⁷ See below, section 2.3.1. on the identity dimension of citizenship.

³⁸ Again the absence of the citizens' initiative seems particularly apparent in contrast to the petition right that is provided for in Article II-104.

rights'.³⁹ The first generation consists in the right of every person to be heard before any individual measure which would affect them adversely is taken. This right was developed since the 1970's by the Court of Justice from competition policy to other areas, and has been recognised in the Charter of Fundamental Rights and the Constitutional Treaty (article II-101). The second generation of participation rights has developed around the right of transparency since the early 1990s. As a legal right, transparency refers mainly to the individual right of access to documents, first regulated in an Inter-Institutional Declaration, and subsequently in a Regulation on Public Access to Documents of the Commission, Council and the EP.⁴⁰ The Charter and the Constitutional Treaty confirm the right of access to documents as a fundamental right and thus applicable to all EU institutions and bodies. Transparency, though, goes beyond the individual's right of access to documents. As a general principle of openness of decision-making it can function as an *ex-post* tool for scrutiny and accountability, but it can equally be a tool for *ex ante* active citizenship by enabling the participation of citizens and organised interests in the policy-process.⁴¹ Although transparency was incorporated into the EU agenda with the accession of the Nordic countries, where the principle is used mainly to secure scrutiny and accountability,⁴² the Commission has immediately linked transparency to the idea of participation in the decision-making process *ex ante*. It is no coincidence that its first communications on transparency and on relations with special interest groups were adopted simultaneously (in 1992).⁴³ This participatory dimension of transparency is confirmed by the Constitutional Treaty which includes an article on transparency (I-50) under the title of the democratic life of the Union, stating that 'in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible'. Put differently, transparency is not only about the individual's access to documents and accountability of the administration, it is also a tool to ensure the participation of civil society at all levels of decision-making from Parliament to offices and agencies.

This ties in with what Bignami calls the third generation of participation rights:⁴⁴ the right to civil society participation – although she adds a question mark. This 'right' finds its foundation in the Commission's strengthened engagement with civil society since the White Paper and the broadening of such engagement to all EU institutions as stated explicitly under the principle of participatory democracy in the Constitutional Treaty. In contrast to 'administrative citizenship', where the citizen interacts with the administration mainly for administrative measures directly concerning her (in particular, the right to be heard, but to a great extent also the right to access to documents), participation (in the follow-up of the principle of transparency) becomes a more general principle of all governance levels; from involvement in the

³⁹ Francesca Bignami (2004), 'Three Generations of Participation Rights before the European Commission', *Law and Contemporary Problems*, Vol. 68, No.1.

⁴⁰ Regulation No. 1049/2001 of the European Parliament and the of the Council of 30 May 2001 regarding Public access to European Parliament, Council and Commission documents, 2001 O.J (L 145) 43.

⁴¹ For an overview of the many different functions and uses of transparency, see Christopher Hood and David Heald (eds) (2006), *Transparency: The Key to Better Government?*, Oxford: Oxford University Press.

⁴² C. Gronbech-Jensen (1998), 'The Scandinavian tradition of open government and the European Union: problems of compatibility?', *5 Journal of European Public Policy*, p.187.

⁴³ Juliet Lodge (1994), 'Transparency and Decmocratic Legitimacy', *32 Journal of Common Market Studies*, p.350.

⁴⁴ Bignami's analysis is entitled 'three generations of participation rights before the European Commission' but acknowledges the more broader 'civil society participation' dimension as explicitly stated in the Constitutional Treaty as applying to all institutions. Yet, the analysis does not engage strongly with the multi-level and new governance dimension, and retains its focus on the European administrative level.

drafting of pre-legislative or delegated regulatory measures, to participation in the implementation of administrative measures, or providing feedback on implementation, participating in reporting at the European, national or local level. Moreover, such ‘governance citizenship’ can even leave regulatory tasks in the hands of civil society, by way of co-regulation, self-regulation or social dialogue. However, this general principle of participatory democracy raises several questions in terms of citizenship, in particular regarding the two other constitutive elements of citizenship, namely rights and identity. Regarding rights, in contrast to the political rights of electoral participation or the administrative rights the individual can rely on, participation under the principle of participatory democracy is rather a practice than a justiciable right – hence Bignami’s question mark. Moreover, the new modes of governance that encourage participation of civil society often do not ensure equal rights as policy outcomes, which may contrast with the egalitarian principle of citizenship. In addition, new governance does not limit participation to nationals, and by addressing mainly stakeholders and civil society organisations it may breach the link between common identity and participation in a polity. Finally, the identity dimension of citizenship relates both to the definition of the citizen and of the polity. With its dispersion of power and blurring between public and private sphere, new governance also complicates the task of defining the polity with which the citizen would identify.

III.2 Rights

III.2.1 Equal input rights: Participation rights or participation practice?

Despite the participatory language of new governance, it generally does not provide participation rights that are justiciable. Much of the Commission’s attention to civil society participation has focused on its involvement in the preparatory stage of drafting new (often legislative) policy measures. While encouraging broader participation the Commission has always preferred not to bind its hands on this, and in particular where legislative measures are concerned its discretion in consulting who it considers most appropriate is justified by the fact that democratic participation is guaranteed by the final word of the European Parliament and the Council. On this front, the White Paper has not introduced ‘new governance’ but renewed slightly the Community Method by strengthening – non-binding - participatory mechanisms in the drafting of new policy measures.

The Commission has, for instance, created on its website a single access point for consultations, called ‘Your-Voice-in-Europe’.⁴⁵ Besides the occasional opportunity to chat with EU leaders, and the possibility to express ‘your experience’ with the implementation of EU policies, the web portal aims mainly at providing a clear access point to consultations on Green and White Papers and Communications. Such consultations can take place on topics of a general nature aiming at a wide public, or can be focused on more specific topics aiming to involve a target group. In each case, the Commission publishes a general report on the results of the consultation, indicating who replied, what were the main arguments, whether this will result in changes to the proposal. However, these procedures do not include any right to participate or means of judicial review.

In December 2002 the Commission also published its Communication on ‘General principles and minimum standards for consultation of interested parties by the Commission’.⁴⁶ The principles are very broadly defined as ‘participation, openness and accountability, effectiveness

⁴⁵ http://europa.eu.int/yourvoice/index_en.htm

⁴⁶ COM (2002) 704 final.

and coherence'.⁴⁷ The minimum standards include some more precise provisions such as a period of at least 8 weeks for reception of responses to written public consultations, and the promise that the results of open public consultation will be displayed on websites. However, while providing a (very) soft proceduralisation of consultation procedures, the Communication states explicitly that it is a non-legally binding document, because 'a situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of the interested parties'. Although this does not exclude its justifiability as a source of soft law - in particular by the European Ombudsman⁴⁸ rather than by the Court - such participation right only has a chance of being enforceable if it relates to participation in implementation measures, given the tradition to regard discretion in consultation practice justified for legislative measures. Yet, the application of the general principles of consultation to implementation measures is not clear since the Communication states that they will be respected 'when consulting on major policy initiatives', 'without prejudice to more advanced practices applied by Commission departments or any more specific rules to be developed for certain policy areas.' In fact, the Communication explicitly excludes from its application two forms of 'new governance', namely comitology and the social dialogue.

As the main procedure for delegated regulation in the EU,⁴⁹ comitology does not provide particular guarantees for civil society participation. The parent regulations or directives pursuant to which implementing rules are made by the comitology procedure normally contain no provisions for participation by those other than the member states representatives in the comitology committees, nor do the comitology procedures themselves normally provide for wider consultation.⁵⁰ While there are several cases in which comitology also includes the consultation of a scientific committee - and the Court has shown willingness to ensure the respect of such consultation requirement -⁵¹ broader civil society hardly finds any place in European delegated regulation. Regulations or Directives that explicitly require the consultation of civil society in comitology are very rare, and there is to date no sign in the case law that the Court would ensure civil society participation in implementation if not very explicitly required by legislation, as it has done to ensure the scientific quality of risk regulation.⁵²

⁴⁷ The same principles had already been put forward in the Commission's White Paper on European Governance.

⁴⁸ See in particular Peter G. Bonnors (2006), 'When EU civil society complains: civil society organisations and ombudsmanship at the European level', in Stijn Smismans (ed), *Civil Society and Legitimate European Governance*, Cheltenham/Northampton: Elgar, p.158.

⁴⁹ For classifying comitology under 'new old governance', see J. Scott and D. Trubek (2002), 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *European Law Journal*, p.1-18.

⁵⁰ See also Paul Craig (2006), *EU Administrative Law*, Oxford: Oxford University Press, p.321.

⁵¹ Case C-269/90, Hauptzollamt München-Mitte v. Technische Universität München [1991] ECR I-5469; Case C-212/91, Angelopharm GmbH v. Freie und Hansestadt Hamburg [1994] ECR I.171.

⁵² On the tendency in the case law to a general principle of requiring that risk regulation be based on a certain level of scientific assessment, see C. Joerges (1999), "'Good Governance" Through Comitology?', in C. Joerges and E. Vos (1999) (eds), *EU Committees: Social Regulation, Law and Politics*, Oxford, 311-338; and K. St. C. Bradley (1999), 'Institutional Aspects of Comitology: Scenes from the Cutting Room Floor', in id., at 71-93. See also more recently, Case T-13/99 *Pfizer Animal Health v. Council* [2002] ECR II-3305; and LT-70/99 *Alpharma v. Council* [2002] ECR II-3495. On the absence of a comparable procedural rigour to ensuring civil society participation in European policy-making, see S. Smismans (2004), *Law, Legitimacy and European Governance*, Oxford: Oxford University Press p.213-218 and 225-232. In the same direction, see L. Azoulay (2001), 'The Court of Justice and the Administrative Governance', 7 *European Law Journal*, 425-441. Yet, Azoulay sees in the UEAPME case the potential for a more general procedural requirement calling for the creation of 'consultative forums' or 'contradictory and representative procedures' (other than procedural requirements for 'adversarial expertise' on basis of scientific knowledge). In my view this would

Under the European social dialogue too it would be difficult to claim a right to participate. In a Communication of 1993⁵³ the Commission has set out the criteria associations of management and labour need to confirm with in order to be consulted on legislative social policy initiatives. Annexed to the Communication the Commission had set out a list of associations conforming with the criteria – a list subsequently updated. Yet, even for the listed associations it would be difficult to talk about an enforceable right to participate. Although a Communication might be justiciable as a source of soft law, it is very unlikely that a listed association that has not been consulted could ask for the annulment of the final act, given that its ‘consultation right’ will not be considered as significant vis-à-vis the final word of the Parliament and the Council in the legislative act. Also in the process of negotiation of agreements between management and labour it is difficult to claim a right to sit at the negotiation table. First of all, the Court of First Instance has confirmed the principle of ‘mutual recognition’, namely being in the first instance a private contract it is up to the signing parties to identify each other. Yet, for European collective agreements to be implemented by Council Directive, the signing parties will need to show they are representative. No association is considered representative by definition, but representatives will be assessed according to the issue of negotiation. This implies that an association not represented at the negotiation table may try to contest the representativeness of the partners who signed the agreement. Yet, the UEAPME case⁵⁴ has shown how difficult this is, since it would be enough for the signing parties to show ‘sufficient collective representativeness’, that is together they are representative enough to deal with the issue irrespective of the fact that there may be other representative associations in the sector.⁵⁵

Also in the networking role of European agencies, participation occurs through a fluid process without providing participation rights. While the statutes of some of the European agencies provide for representation of civil society actors in their Board at the European level⁵⁶ or include a general provision that their work should be based on open and transparent consultation,⁵⁷ the composition of the decentralised network is left to the initiative and the discretion of the National Action Points, i.e. the responsible division within the national administration. In a comparable way, the OMC may provide for some legal obligation to involve civil society actors at the European level, such as the Treaty obligation to consult management and labour in the employment OMC, but the encouragement of decentralised participation leaves scope for the Member States to respect such guidelines or not.

require a very strong ‘saut qualitatif’ in the case law, given that the UEAPME case conceived of the importance of civil society participation only in a well established (pseudo-)legislative procedure where social partners are said (still according to the Court) to replace the democratic representation of the European Parliament. It is doubtful the same ‘democratic attributes’ would be assigned to civil society actors in other procedures where they have not such a strong Treaty based and legislative role as in the social dialogue. See S. Smismans (2004), p.343-354.

⁵³ Commission Communication on the Application of the Social Agreement, COM (2002) 341 final.

⁵⁴ Case T-135/96 UEAPME v. Council [1998] ECR II-2338.

⁵⁵ For a detailed analysis, see Smismans (2004), supra note 52, at 391-394.

⁵⁶ The European Foundation for the Improvement of Living and Working Conditions, the European Centre for the Development of Vocational Training, the European Agency for Safety and Health at Work, the European Food Safety Authority, and the European Maritime Safety Authority.

⁵⁷ The European Food Safety Authority Regulation stipulates that there shall be open and transparent public consultation during the preparation, evaluation, and revision of food law, except where urgency precludes this. Regulation 178/2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, OJ 2002 L31/1, art.9.

To summarize, new governance hardly provides any legally enforceable participation rights although there are some exceptions to that rule. Very occasionally, for instance, European legislation will set explicit requirements for the consultation of advisory committees composed of civil society actors in the drafting process of delegated regulation, or make a notice and comment procedure obligatory to adopt implementing measures.⁵⁸ Moreover, occasionally European legislation has required the Member States to adopt certain participatory procedures, such as in the case of environmental impact assessments.⁵⁹

Yet, the main question to consider regarding new governance in terms of active citizenship may not be to ask whether new governance provides for legally binding participation rights. The fluidity of participation in new governance may contrast with the legal perspective (as well as the liberal interpretation) of citizenship where political and administrative participation has always taken the form of clearly identifiable rights for the citizens. However, sociologists and to a certain extent political scientists⁶⁰ have examined the participatory dimension of citizenship in terms of a practice rather than as a set of participation rights (an approach as well supported in the communitarian interpretation of citizenship).⁶¹ From this perspective the legal question should thus not be whether participation rights are legally enforceable but whether legal procedures enhance participation practice. The social dialogue, for instance, does not provide clearly enforceable rights, but has introduced a participation practice which is always respected by the Commission. In the same way, networking by European agencies and the OMC have changed – with more or less success – participation patterns. From this perspective, the more or less soft procedures of new governance have created multiple new forms of participation. Yet the proof of the pudding is in the eating: To what extent has new governance really enhanced participation? Moreover, to what extent can one talk about equal participation? However, these questions equally apply to binding participation rights; while they create an equal right to participate for each citizen, this does not imply that citizens *de facto* use that right, and even less that they participate equally as resources may influence the way citizens make use of their rights. Put differently, as soon as one takes participation practice as a criterion of citizenship, rather than participation rights, the task of the lawyer changes in thinking about the different available procedural tools to enhance participation, among which enforceable participation rights are just one option. Yet, it also places the lawyer in the awkward position of having to rely on empirical assessment if attempting to make any judgement on the ‘goodness’ or ‘evil’ of particular procedural solutions.

III.2.2 Equal output rights?

While new governance may strengthen the participatory dimension of citizenship (although often in soft participatory terms and practice rather than in participatory rights) it may be more difficult to fit with the idea of citizenship in terms of guaranteeing equal rights as the

⁵⁸ For some examples in the field of occupational health and safety regulation, see Smismans (2004), *supra* note 52, at 227.

⁵⁹ J. Scott and J. Holder (2006), ‘Law and New Environmental Governance in the European Union’, in De Búrca and Scott, *supra* note 9, at 211-242.

⁶⁰ Nentwich, for instance, identifies 15 opportunity structures for citizens’ participation in the EU, going from voting for the EP, to protest action and reacting on Green Papers. M. Nentwich (1998), ‘Opportunity Structures for Citizens’ Participation: the Case of the European Union’, in A. Weale and M. Nentwich (Eds), *Political Theory and the European Union*, London: Routledge, p.125-140.

⁶¹ In this interpretation, citizenship often does not primarily mean active political participation but rather activities in the social sphere; see, for instance, B. S. Turner (1992), ‘Outline a Theory of Citizenship’, in C. Mouffe (ed), *Dimensions of Radical Democracy*, Verso, p.33-63; and E. Meehan (1993), *Citizenship and the European Community*, Sage, p.30.

output of policy-making. New governance is said to be characterised by its soft norms and its flexibility to adapt to context and local conditions. This seems to contrast with citizenship in two ways: it does neither provide rights nor an equal outcome for all citizens. To give but two examples. The Open Method of Coordination has been precisely introduced to coordinate national policies without having to adopt common binding European norms. This leaves flexibility to the Member States, but thus also for European citizens to be treated differently. Moreover, there is a greater ‘fluidity’ of language in OMC documents than would be normal in legal texts.⁶² Debates resolve not around formally drafted legal texts, but around the choice of indicators, the availability and reliability of data, objectives and targets. Lyon-Caen and Affichard talk about a shift ‘from legal norms to statistical norms.’⁶³ In the European social dialogue too – in particular since its recent tendency to more autonomous dialogue –⁶⁴ soft norms are preferred to binding rights while implementation will take place according to diversity of industrial relations systems. The European social partners sign ‘Framework Agreements’ and ‘Frameworks of Actions’, using OMC-inspired reporting mechanisms to follow up how their member organisations implement them with different industrial relations tools available in the Member States, which leads to very different outcomes.⁶⁵

However, it would be wrong to conclude that new governance means automatically the end of citizenship because it would neither provide rights nor equal outcome. First of all, although citizenship is traditionally identified with rights, the equal treatment of citizens is not only related to a set of rights but to the broader policy outcome in which other policy tools also play a role. From this perspective, the setting of common objectives, indicators and benchmarks at the European level does not undermine citizenship but may contribute to European citizens being treated in the same way. The setting of an overall employment rate of 70% by 2010, for instance, aims at creating comparable employment possibilities for citizens across the EU. This is even more the case where targets have an explicit ‘equalizing objective’, such as the quantitative target of female employment of 60%. The EU may not intervene with binding rights, but it contributes to equalizing output by encouraging certain policies. The language of statistics is thus no natural enemy of citizenship. Moreover, one has to acknowledge that new governance does not necessarily constitute ‘a hard law opportunity manqué’,⁶⁶ given that some policy areas are not particularly regulatory in nature anyway – such as employment policy – or because the political conditions would never have allowed the adoption of binding norms at the European level. The social partners’ agreement on stress, for instance, encourages action in this field across Europe, while a binding norm on the issue would never have been adopted due to the differences between Member States and management’s resistance. In addition, as several contributions to this journal issue show, hard and soft law can be combined in different manners; for instance, by using new governance to obtain better implemen-

⁶² Kenneth Armstrong (2006), ‘Inclusive governance? Civil society and the open method of co-ordination’, in Smismans (2006), *supra* note 48, at.53.

⁶³ Antoine Lyon-Caen and Joëlle Affichard (2005), ‘From Legal Norms to Statistical Norms: employment policies put to the test of coordination’, in Olivier De Schutter and Simon Deakin (ed), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Brussels: Bruylant, p.145.

⁶⁴ The first European collective agreements have been implemented by Council Directive, using the binding character of EU law to ensure implementation of these documents. Yet, since 2000, the European social partners have preferred to implement their documents in a more autonomous way, with the instruments of industrial relations available to them at the national level.

⁶⁵ For a more detailed analysis of the shift to more autonomous social dialogue, see Stijn Smismans (2007), ‘The European Social Dialogue Between Constitutional and Labour Law’, *European Law Review*.

⁶⁶ Claire Kilpatrick (2006), ‘New EU Employment Governance and Constitutionalism’, in De Búrca and Scott, *supra* note 9, at 127

tation of hard law. To give but some examples that relate to rights that are most directly conceived as constituting citizenship: the European citizenship rights set out in articles 17-21 EC are complemented in article 22 by an obligation for the Commission to report periodically to the European Parliament on the application of these citizenship provisions, thus using ‘soft reporting’ to strengthen the application of binding rights. Gráinne de Búrca has shown how the EU has adopted an anti-discrimination package in which an EU framework directive with broadly defined objectives and premised on the need for the involvement of intermediate institutions is backed up by a network of relevant institutions and stakeholders, and supported by a set of programmes intended to mobilise and resource civil society actors and to generate a body of cross-national data and research.⁶⁷ More generally, it has been argued that the OMC tool could be used for a real fundamental rights policy;⁶⁸ reporting can give concrete contextual substance to these abstract rights, and can place Member States under pressure, even for the realisation of (positive) fundamental rights that are not justiciable.

New governance is thus not the anti-thesis of citizenship in as far as it contributes to equalizing outcomes -in a way binding rights could not realize- and in assuring better implementation of these rights. Yet, new governance still creates problems for the ‘equal rights’ dimension of citizenship. First, further analysis is needed on how European soft governance, such as the OMC, affects acquired rights at the national level. The Lisbon process, for instance, has centred around a discourse of economic growth and competitiveness rather than around social citizenship, and the encouragement of co-ordination of social and economic policies has resulted not so much in economic policy being sensitive to social concerns, but to a colonization of the Welfare State by the economic policy-making process.⁶⁹ Secondly, how far can one allow flexibility without emptying the instrument of even the minimum level of ‘common European standard’, or even any effect? Analysing the implementation of the Working Time Directive in the UK, for instance, Barnard, Deakin and Hobbs argue that ‘the Directive is at risk of degenerating into a weak and partial mechanism for the realization of social rights’.⁷⁰ Or still, the implementation of the autonomous agreements of the social partners mentioned above raises such problems that one can question whether there will be any implementation at all, and when there is, workers will profit from it very differently depending on the country they live in, the industrial relations system they are part of, the sector they work in, and whether they belong to a union or not.⁷¹ How does this diversity rhyme with citizenship? And

⁶⁷ Gráinne de Búrca (2006), ‘EU Race Discrimination Law: A Hybrid Model?’, in De Búrca and Scott, *supra* note 9, at 97-120.

⁶⁸ G. de Búrca (2003), ‘The constitutional challenge of new governance in the European Union’, *European Law Review*, 28; Nicholas Bernard (2003), ‘A New Governance’ Approach to Economic, Social and Cultural Rights in the EU’, in Tamara Hervey and Jef Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford: Hart, p.247; Olivier De Schutter (2005), ‘The Implementation of Fundamental Rights through the Open Method of Coordination’, in De Schutter and Deakin, *supra* note 61; Stijn Smismans (2005) ‘How to be fundamental with soft procedures? The Open Method of Coordination and Fundamental Social Rights’, in Gráinne de Búrca and Bruno de Witte (eds), *The Protection of Social Rights in Europe: Changes and Challenges*, Oxford: Oxford University Press, p.217-240

⁶⁹ D. Chalmers and M. Lodge (2003), ‘The Open Method of Coordination and the European Welfare State’, Discussion Paper ESRC Centre for Analysis of Risk and Regulation, No.11, June 2003, p. 10. This economic bias obviously relates to the deep structure of the EC’s economic constitution; De Búrca (2003), *supra* note 66, at 28.

⁷⁰ Catherine Barnard, Simon Deakin and Richard Hobbs (2005), ‘Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: the Case of Working Time’, in De Schutter and Deakin (eds), *supra* note 61.

⁷¹ Smismans (2007), *supra* note 63.

can such flexible governance contribute to any form of identification with the EU? This leaves us to our last and most difficult dimension of citizenship: identity.

III.3 Identity

III.3.1 Citizen: national, resident or stakeholder?

In the concept of citizenship, participation and identity are intrinsically linked. ‘Self-legislation also implies self-constitution. “We, the people” who agree to bind ourselves by these laws, are also defining ourselves as “we” in the very act of self-legislation.’⁷² The traditional key that links identity to political participation is the criterion of nationality. The traditional core participation rights of citizenship, namely voting and the right to stand as a candidate in elections have been confined to nationals of the State. In the same way, EU citizenship has established an identity link between the European polity and its citizens by confining participation in European and municipal elections in the Member State of residence to ‘European citizens’, i.e. those being a national of a Member State. Also the new political right of the ‘citizens’ initiative’ provided by the Constitutional Treaty is reserved to nationals of the Member States, despite the fact that this right is neither mentioned in the citizenship article (I-10) of the Constitution, nor under the ‘citizens’ rights’ of part II of the Constitution (the Charter).

Yet, as soon as one goes beyond these core political rights, the relationship between nationality and participation rights disappears.⁷³ Even articles 18-22 EC, defining European citizenship, mention ‘participation rights’ that are not confined to the nationals of the Member States. The rights to petition the European Parliament and to apply to the Ombudsman are not limited to EU citizens but apply also to ‘any natural or legal person residing or having its registered office in a Member State.’⁷⁴ The same applies for other administrative rights that may contribute to a more participatory European administration, such as the right to be heard in relation to individually effecting measures, and the right of access the documents of EU institutions, such as developed in the case law⁷⁵ and now enshrined in the Charter of Fundamental Right (and the corresponding part of the Constitutional Treaty).⁷⁶ The more one moves to the administrative and governance dimension of participation, the less such participation is linked to the requirement of nationality. This breaches the link citizenship = nationality = participation. The pessimistic reading of this would be that European citizenship would not create much ‘identity’ in that it does not provide many exclusive participatory rights non-nationals would not profit from. The optimistic interpretation would be that the citizenship ideal of self-governance is applied to an ever larger group of people, who –although not profiting from all

⁷² Seyla Benhabib (2002), ‘Transformation of Citizenship: The Case of Contemporary Europe’, *Government and Opposition*, Vol.37, No.4, p.451.

⁷³ This is part of the broader tendency that rights and identity are increasingly decoupled. See J. Shaw (1997), ‘Citizenship of the Union: Towards Post-National Membership?’, Harvard Jean Monnet Working Paper Series, No.6/97, Cambridge, Mass: Harvard Law School. At the European level, one needs to acknowledge in particular the effect of the Council Directive on third-country nationals who are long-term residents (2003/109/EC of 25 November 2003), which aims at giving to third-country nationals much of the same rights as to EU citizens – in particular regarding free movement - in case they are resident in the EU territory for more than five years.

⁷⁴ See Article 194 EC for the petition right and for the Article 195 for applying to the Ombudsman.

⁷⁵ Paul Craig (2006), *EU Administrative Law*, Oxford: Oxford University Press, p. 314 and 353

⁷⁶ See Article 41 (right to good administration) and 42 (access) of the Charter, and Article II-101 and 102 Constitutional Treaty. Although not entirely explicit, the explanatory note to the Convention draft of the Constitution of 6 February 2003 (CONV 528/03; Annex II) seems to suggest that the rights to good administration and the right of access would not have been included into the article on citizenship (article 7) precisely because these rights are granted to every person.

participation rights – may nevertheless develop a sense of belonging to the polity they are participating in (as residents).

Even more than participatory rights under the principle of good administration, new governance further breaches the link between participation and nationality. As argued above, new governance encourages participation at multiple levels but in a fluid way without creating particular participation rights. In this context, nationality can hardly be set as a stringent condition. New governance does neither focus on the participation of nationals nor of ‘every (legal) person being resident’ but encourages, above all, the participation of ‘those affected’,⁷⁷ ‘interested parties’, and ‘stakeholders’. This creates two problems for the identity dimension of participation in new governance. First, ‘interested parties’ and ‘stakeholders’ are generally not defined by their nationality, which further weakens the link between nationality and participation. The Commission, for instance, defines an “interested party” as ‘an individual or group that is concerned or stands to be affected – directly or indirectly –by the outcome of a policy process; or represents the general interest of groups concerned by such an outcome, *within and outside the EU*(my stress)’.⁷⁸ Second, and more crucially, by encouraging the involvement of stakeholders, new governance engages certain categories of persons excluding others which may be at odds with the egalitarian nature of citizenship. By defining those having an interest or a stake, this group becomes identified as different from other citizens. Can encouraging stakeholder participation fit with the idea of a common identity that underpins citizenship?

III.3.2 Individual or group participation: the citizen-stakeholder?

Citizenship defines citizens as equals in rights and duties vis-à-vis the polity. However, ‘equality’ is not limited to the equal position in exercising rights but refers also to the identity dimension of citizenship.⁷⁹ Within the nation-state context, it assumes a common identity on which one can base the expression of the general political will via parliamentary representation. Consequently ‘citizens are deprived of their particularities and their embeddedness in particular communities, cultures, and social roles and conceived as abstract political beings whose opinions converge around a concept of the public good which is more or less shared by all because all are equals. Only equals can form a general will.’⁸⁰ Several authors have argued that any new conception of citizenship has to address the fragmentation of meaning and identities in the multi-cultural and multi-functional reality of present societies.⁸¹ According to

⁷⁷ Using ‘affectedness’ as criterion for participation has not only been used in relation to new governance, but also to argue for participation of resident-alien in elections, or to decide on locus standi in courts, see Chris Hilson (2006), ‘EU Citizenship and the Principle of Affectedness’, in Bellamy, Castiglione and Shaw (eds), *supra* note 4, at.56-74.

⁷⁸ Commission Communication on the Collection and Use of Expertise by the Commission: Principles and Guidelines, COM (2002) 713 final, p.3

⁷⁹ According to J. Tully (1995), the main strands of modern constitutional theory, namely liberalism, communitarianism and nationalism, rest upon a presumption of homogeneity, articulated respectively, ‘as a society of undifferentiated individuals, a community held together by the common good or a culturally defined nation’. See also N. Walker (2002), ‘The Idea of Constitutional Pluralism’, 65 *The Modern Law Review*, p.330.

⁸⁰ U. K. Preuss (1998), ‘The Constitution of a European Democracy and the Role of the Nation States’, Paper presented at the Conference ‘A Discursive Foundation for Law and Legal Practice. Discussing Jürgen Habermas’ Philosophy of Law’, European University Institute, Florence, 12-13/6/98, p.8.

⁸¹ For a usual overview, see Thomas Pfister (2005), ‘Citizenship and Globalization’, *Ethnopolitics*, Vol. 4, No. 1, p.105-113, with reference to Stephen Castles and Alastair Davidson (2000), *Citizenship and Migration. Globalization and the Politics of Belonging*, Palgrave; Gerard Delanty (2000), *Citizenship in a Global Age: Society, Culture, Politics*, Open University Press; Richard Münch (2001), *Nation and Citizenship in the Global Age*, Palgrave.

Chantal Mouffe, the body of rights constitutive of citizenship should not only ensure equality but should also recognize difference.⁸² The ‘reducing of the citizens to abstract equals alienated from their multiple identities’ is not a necessity if democracy is conceptualised in terms other than the traditional parliamentary model. According to Preuss, a democratic polity should

provide institutional devices through which individuals can participate in the process of political decision-making without being forced to give up beforehand the qualities which constitute their individuality. Hence, participation in the political process does not require individuals to slip of their individual properties and diversities and to abstract from their affiliations to specific communities, life styles, interest groups, social contexts, etc. On the contrary, democracy as the collective form of individual freedom and autonomy encourages the incorporation of these particularities in the process of political decision-making.⁸³

Citizenship within such a democratic polity should mean that the citizen in its multiple identities has equal opportunities to participation and representation in decision-making. Multiple identities can find their origin in both territorial and functional diversification. Seyla Benhabib argues how factors of territorial diversification related to globalization lead to ‘disaggregated citizenship’, which is in tension with the model of democratic legitimacy defined as ‘the self-constitution of “we” the people understood as if it were the unilateral act of a homogeneous citizenry’. Yet, while she argues in favour of ‘mov[ing] away from the legal fictions of homogeneity and self-enclosure toward reflexive acts of constitution-making’, she only defines the discursive will- and opinion-formation in relation to membership based on territorial diversification (national, subnational, regional and municipal).⁸⁴ However, people do not only belong to multiple territorial levels, but have also bounds of identification related to cultural, social, and economic grounds.

Although acknowledging the multi-level territorial dimension of policy-making as well (such as in the partnership principle), new governance - with its focus on involving stakeholders or ‘interested parties’ – precisely encourages participation on the basis of identification with certain groups, life styles, cultural and economic interests. New governance could thus be conceived as a contribution to more active citizenship in which the citizen is not reduced to a one-dimensional common abstract identity, but could rather express her multiple identities and loyalties through various participatory mechanisms.⁸⁵

However, such a conceptualisation of citizenship raises several questions.

First, citizenship is a multi-faced concept, and as argued above different approaches have stressed the constitutive elements of citizenship differently. One can indeed prioritise the participatory dimension of citizenship over its identity dimension, but there is only so far one can stretch the concept of citizenship by recognising the multiple and flexible identities of citizens without emptying the concept of one of its constitutive elements that is a common sense of belonging.

⁸² Mouffe, *supra* note 59, at 5.

⁸³ Preuss (1998), *supra* note 78, at.9.

⁸⁴ Benhabib, *supra* note 70, at.450.

⁸⁵ In a comparable way Hilson argues that interest groups lobbying EU institutions ‘can be seen as representing their particular functional constituencies, providing them with a transnational citizenship voice.’ This would also ‘enable citizens from the most affected Member States to register the intensity of their interests in a way in which voting is unable to reflect.’ Hilson, *supra* note 75, at.65.

Second, recognising difference can have very diverse meanings. Marshall's analysis of social citizenship starts from the recognition of (unjustified) socio-economic differences. Establishing particular participation rights for certain categories, such as for organised labour in neo-corporatist systems would then lead to more egalitarian welfare outputs.⁸⁶ 'Unequal' participation rights are justified by the realisation of equal (output) rights. In the same way, in feminist theory, recognising difference may mean ensuring particular guarantees for women's participation in political decision-making to ensure equal treatment. Yet, in particular the feminist debate has also taught us that recognising difference may also mean treating different identities differently, namely creating different (output) rights for different categories. So how does new governance relate to difference? As argued above new governance often leads to soft law, contextual and flexible solutions. It seems difficult to fit this in Marshall's justification of particular participation rights to arrive at equal (output) rights. New governance rather combines recognising difference on the input side – by focusing on the participation of stakeholders – with difference on the output side. However, the feminist debate has equally pointed to 'the discursive dangers of "difference"'⁸⁷ and the inherent tension in thinking of citizenship as the right to be equally different.

Third, institutionalising 'difference' in participatory procedures has proven to be difficult. Although in theory individual stakeholders could be involved in policy-making, in practice this happens mainly through the participation of functional intermediaries. Stakeholder participation normally implies group participation. Hence, new governance's engagement with the concept of civil society. Again, the idea of participatory group rights has been developed particularly within the feminist debate, and then been extended to other groups such as ethnic minorities. Yet, most of this debate has focused on the idea of quotas in the traditional political institutions, such as parliament, government and political parties, or on movement based action and grassroots and local activism (in some interpretations also in opposition and outside the 'male political world'),⁸⁸ while much less attention has been paid to how group participation can be ensured in interaction with the administration and in the multiple fora of dispersed power in modern multi-level governance, let alone in the particular setting of the EU. One might therefore more successfully rely on the opposite models of neo-pluralism and neo-corporatism, the first guaranteeing equal rights of participation for all interests groups (for instance, on the model of the American Administrative Procedures Act) but thus potentially also favouring those with most resources; the second aiming at the inclusion of certain interest groups in a more informal manner, thus excluding de facto other groups but also ensuring a certain balance in interest representation. Traces of both models can be found in new governance in the EU. On the one hand, very occasionally a neo-pluralist notice and comment procedure is used in implementation. The European social dialogue, on the other hand, creates not a strongly enforceable right but nevertheless a strong established practice of privileged access for a balanced representation of the social partners. However, most often new governance does neither fit the neo-pluralist nor the neo-corporatist description. It is more 'fluid' and able to reflexively adjust to changing conditions than neo-corporatism and potentially more pluralist in including more actors. However, it may lack the more balanced representation of neo-corporatism, and in not providing real rights of participation it may also end up being a merely legitimating discourse without truly enhancing participation. Yet, the most serious

⁸⁶ T. H. Marshall (1950), *Citizenship and Social Class*, Cambridge: Cambridge University Press.

⁸⁷ Birte Siim and Hege Skjeie (2004), 'The Scandinavian Model of Citizenship and Feminist Debates', in Bellamy, Castiglione and Santoro, supra note 3, at 159.

⁸⁸ Iris Young (1990), *Justice and the Politics of Difference*, Princeton: Princeton University Press; Anne Phillips (1993), *Democracy and Difference*, London: Polity Press; Anne Phillips (1995), *The Politics of Presence*, London: Polity Press.

concern about interest group participation in terms of citizenship is how such participation relates to the involvement of individual citizens. Warleigh, for instance, is sceptical on the potential of NGOs as agents of EU citizenship, since they do not allow their supporters to engage directly with policy making, and provide no or few means by which they can learn about or influence the European integration process and related public policy.⁸⁹ This problem is accentuated by the ever increasing professionalisation of interest representation in Brussels.⁹⁰ Analysing civil society activity at the European, national and local level in the fields of environmental and anti-racism policy (comparing 9 countries), our mean finding has been that civil society organisations are active at all levels on these issues but the local level is often entirely detached from what is going on at the European one.⁹¹ The challenge for new governance will be to try to bridge this gap. Fostering decentralised participation in the OMC, however, shows that this does not automatically mean that decentralised actors,⁹² and far less citizens, perceive the process as of importance to them. Without bridging this gap, participation in new governance may not be able to ensure that the European citizen identifies with the European polity.

III.3.3 The blurring public-private divide: the consumer-citizen?

The question of identity in citizenship does not only concern the definition of who the citizen is, it equally implies defining the polity. They are the two sides of the same coin. Thus the identity debate on European citizenship has to deal not only with ‘third country nationals’ and ‘legal residents’ versus ‘citizens’, but also with defining ‘the nature of the beast’⁹³ -European polity- as well as its borders. The (new) governance debate further deepens the ‘polity identity’ question. If citizenship belonging is about the relation between ‘governed’ and ‘government’ the dispersed character of the ‘government’ in modern governance cannot be without effects on citizenship. Defining the ‘polity identity’ of the EU does not only concern questions of ‘dispersion’ due to multi-level governance between the European and national (regional and local) levels, it also raises questions on whether ‘government’ is ‘public’ or ‘private’ or a combination of the two. New governance is characterised by an increasing blurring of the public-private divide. Both regulatory tasks and service delivery are often – explicitly or implicitly – delegated to complex public-private interactions, or entirely left over to the private sector. In this broad ‘fusion zone’ the public sector becomes more open to the dynamics, techniques and language of the market, whereas private actors have to deal with conditions set by public authority or integrate - on their own initiative and to improve their market position - broader ‘citizen concerns’, often under the banner of ‘corporate social responsibility’. In both cases the concept of the ‘consumer-citizen’ has been suggested. For the public sector it implies considering the citizen also as a consumer of a well managed public service,

⁸⁹ Alex Warleigh (2001), “Europeanising” Civil Society: NGOs as agents of political socialisation’, *Journal of Common Market Studies*, 39, 4, p.619-639.

⁹⁰ Sabine Saurugger (2006), ‘The professionalisation of interest representation: a legitimacy problem for civil society in the EU?’, in Smismans, supra note 48, at.260-276.

⁹¹ I am indebted on this to all my colleagues of the CIVGOV project, an FP6 Integrated Project funded by the European Commission, and coordinated by Carlo Ruzza at the Faculty of Sociology of the University of Trento.

⁹² For a more optimistic view, see Laura Cram (2006), ‘Inventing the people: civil society participation and the enhabitation of the EU’, in Smismans, supra note 48, at.241-259. She argues, analysing participation in EU gender policy, that one can talk about ‘banal Europeanism’, i.e. the EU is becoming ‘enhabited’ in so far as individuals increasingly ‘forget to remember’ that the current situation – namely, EU integration – is not how things always were.

⁹³ T. Risse-Kappen (1996), ‘Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union’, 34 *Journal of Common Market Studies*, 53-80.

whereas for the private sector it means taking into account citizen concerns that go beyond the direct product and service demands of the consumer.

However, the blurring public-private divide raises many questions from a citizenship perspective.

First, the dispersion of power does not correspond with the picture of the monolithic command-and-control State which the citizen would automatically identify as the ‘single’ government. If the European Union relies on private (international) standardisation bodies, on self-regulation and autonomous agreements of the social partners, how does this affect the way citizens identify with the European polity? Do citizens identify with the European Union if the sources of regulation and decision-making are dispersed over multiple loci in which ‘citizens’ are conceived only in their belonging to a particular functional category?

Second, when ‘the public goes private’, does one lose values associated with citizenship? This question has been particularly raised in the context of administrative reforms under the banner of New Public Management (NPM). NPM has toyed with the idea of the ‘citizen as a client’⁹⁴ or the ‘citizen as a consumer’.⁹⁵ Improving accessibility of public services by means of decentralisation, provision of information and various forms of consumer-feedback systems have been introduced with the objective to make public services more ‘consumer friendly’. Obviously, better public services can only be welcomed. Yet, the consumer-citizen concept is not always a win-win situation. The extra rights acquired as consumer do not always simply add up to the established citizen rights. What the individual wins as a consumer in the turn to New Public Management s/he may lose as a citizen. In the turn to cost-efficient services, centred on the idea that the public sector can and should be managed in the same way as private companies, traditional citizenship values of public administration such as equity and due process tend to be lost. Thus, management strives to control costs by excluding difficult clients, patients and citizens, by limiting the range of services and by shifting the responsibility for difficult “cases” to other departments.⁹⁶ Moreover, by processes of out-sourcing and privatization the political channels of influence for citizens over services are limited further. The division between policy and operational functions reduces the influence of politicians to the minimum, allowing them at best to change contracts and institutional arrangements at certain points in time, a process which may stand far from the immediate and daily needs of citizens.⁹⁷ For sure, many of the problems raised apply mainly to changing modes of administration in relation to service delivery, and the EU hardly engages in such type of direct service delivery. However, some of the issues also turn up in relation to the European administration. The debate on the European agencies has focused on the idea of making policy-making and administration more independent from regular political involvement. Moreover, the agencies themselves often use the language of being customer-friendly and of taking into account the need of ‘their stakeholders’ or ‘their clients’. To date, European administrative law guarantees relatively well concerns of accountability of European agencies — ~~applying for instance rules~~ on transparency and access to documents.⁹⁸ Yet, if European

⁹⁴ Stefan Sjöblom (1999), ‘Transparency and Citizen Participation’, in Luc Rouban (ed), *Citizens and the New Governance. Beyond New Public Management*, Ios Press, Amsterdam, p.22.

⁹⁵ Carsten Greve and Peter Kragh Jespersen (1999), ‘New Public Management and its Critics. Alternative Roads to Flexible Service Delivery to Citizens?’, in Luc Rouban (ed), *Citizens and the New Governance. Beyond New Public Management*, Ios Press, Amsterdam, p.147.

⁹⁶ Carsten Greve and Peter Kragh Jespersen (1999), ‘New Public Management and its Critics. Alternative Roads to Flexible Service Delivery to Citizens?’, in Luc Rouban (ed), *Citizens and the New Governance. Beyond New Public Management*, Ios Press, Amsterdam, p.146.

⁹⁷ Carsten Greve and Peter Kragh Jespersen (1999), ‘New Public Management and its Critics. Alternative Roads to Flexible Service Delivery to Citizens?’, in Luc Rouban (ed), *Citizens and the New Governance. Beyond New Public Management*, Ios Press, Amsterdam, p.148.

on transparency and access to documents.⁹⁸ Yet, if European agencies were to acquire more decision-making and discretionary powers than today, greater procedural regularity would be required, in order to avoid that ‘delivering what the clients want’ would not broader citizens’ concerns of democratic accountability.

Third, ‘when the private goes public’, how far can procedural requirements related to the idea of citizenship be applied? The European social dialogue, for instance, is built on a permanent tension between the Commission attempting to impose elements of public control and accountability over the process and the social partners claiming their ‘traditional autonomy’ in the context of industrial relations. More generally, analysing the Commission’s attempt to set conditions on civil society actors wanting to take up a more important role in policy-making, Carol Harlow calls for respecting the public-private law divide. In the White Paper, the Commission plays with the idea that the internal structures of civil society organisations should reflect principles of good governance, openness and accountability as developed for purposes of public accountability. Harlow stresses that the fundamental right of freedom of association should be respected, and therefore suggests that the first step to increase further control may be by tightening the relatively relaxed controls of private law over civil society organisations rather than relying on public law.⁹⁹ If imposing public accountability requirements on private actors is a delicate issue, the application of the idea of citizenship in this context appears even more problematic.¹⁰⁰ While a citizen discourse could help incorporate values of participation and accountability, the current handling of the concept by the private sector seems to empty it of all its content. Unilever, for instance, uses the category of ‘consumer-citizen’ as a term that expresses the ways that publics relate to the company other than as economic consumers of its products, for instance to describe public attitudes to GM foods that could not be captured in terms of consumer preferences alone. Taking into account the citizen-consumer, Unilever would listen to citizen-like expressions by consumers regarding technologies used in its products and the corporation itself. Yet, evidence seems to suggest that this has not led to a changed strategy but rather to the company hoping that this will help market existing products more successfully.¹⁰¹

IV. Conclusion

New governance provides many forms of participation which go beyond the citizens’ involvement in electoral processes or their (‘activated’) role around constitutional moments. In this sense, new governance contributes to a more active European citizenship. Yet, one can also understand why European citizenship and new governance have not found each other easily in the political debate.

New governance does not always sit comfortably with the rights and identity dimension of citizenship. Regarding the rights dimension, new governance contributes to participation practice rather than to ensuring equal participation rights. Moreover, the flexible outcomes of new

⁹⁸ Craig, *supra* note 50, at 164-180

⁹⁹ Carol Harlow (2006), ‘Civil society organisations and participatory administration: a challenge to EU administrative law?’, in Smismans, *supra* note 48, at 115-140

¹⁰⁰ In the same way, the idea to apply human rights to private actors remains the subject of controversy. See, A. Clapham (2006), *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press. The use of a citizenship discourse in relation to private actors may appear as even another step further. Yet, while even more linked to the State than human rights, citizenship invokes more directly the participatory dimension.

¹⁰¹ Robert Doubleday (2004), ‘Institutionalising non-governmental organisation dialogue at Unilever: framing the public as “consumer-citizens”’, *Science and Public Policy*, Vol. 31, No.2., p.125.

governance may contrast with the egalitarian (output) rights dimension of citizenship. However, lawyers may learn from political scientists and sociologists to take into account the empirics of participation practice and to investigate how procedural rules –hard or soft - can improve it, rather than contenting themselves with the fiction that equal participation rights mean by definition equal participation. Also on the ‘output’ side, new governance needs not to be the anti-thesis of citizenship, since it can be combined with hard law rights or provide egalitarian outcomes in a way binding rights cannot. While the rights dimension is surely not without problems, it is, though, on the identity dimension of citizenship that new governance raises most questions. The issue of ‘national’ versus ‘resident’ is a minor one compared to the questions posed by governance mechanisms that focus on stakeholders and group participation, and that blur the public-private divide.

Many different interpretations have been given to citizenship and its constitutive elements have been stressed differently. How far one can privilege the participatory dimension over the rights and the identity dimension, and how far citizens will follow in such an interpretation remain unanswered questions. On the aftermath of the difficult ratification process of the Constitutional Treaty it is now argued that the language of constitutionalism reduces rather than enhances the support and trust Europeans exhibit towards the European polity.¹⁰² In the same way, wouldn’t invoking the value-laden concept of citizenship constructed in the context of the nation-state undermine even further citizens’ trust in the EU since it would show the gap between the normative ideal and today’s European policy-making? Yet, the conclusion cannot automatically be that the normative political ideals and standards of democratic governance and citizenship should be scrapped, as this would run counter to the traditional critical function of normative political theory.¹⁰³ One thing is sure, if we want to rely on the concept of citizenship as a normative framework for contemporary multi-level governance in the EU, the traditional interpretations of citizenship will not do the job.

¹⁰² Renaud Dehousse (2006), *La fin de l’Europe*, Flammarion.

¹⁰³ Adreas Follesdal, ‘Citizenship: European and Global’, ARENA Working Papers WP 01/22, p.7.