Citizenship and Constitutionalism in the European Union – what role for political rights?

Inaugural Lecture delivered by Jo Shaw, Salvesen Chair of European Institutions
School of law, University of Edinburgh
31 October 2006

I am honoured, on every count, to be standing here today before such a large and distinguished audience. This may be my third chair, but it is my first inaugural lecture, and for that reason, I think it is generating even more nerves than might otherwise be the case. I have thought long and hard about how to balance the competing interests which arise on such occasion. On the one hand, when delivering an inaugural lecture, to an inevitably mixed audience many of whom have brought friendship, support and collegiality, and, yes, sometimes even love, into my life, one needs to offer something for everyone. On the other hand, I must do proper justice to my topic of Citizenship and Constitutionalism in the European Union – what role for political rights, as it is also a lecture in the Europa Institute’s MacCormick Lecture series which has explored the question ‘Does the European Union have a Constitutional Future?’ I have no one to blame but myself if I am trying to reconcile rather wildly differing interests and focuses, for it was I who suggested that I might combine the two things. In any event, it has forced me to give even more thought than I might already have done to the question of whether to devote some time at the beginning of the lecture to covering the ceremonial and obviously hugely pleasurable ground of paying debts of honour and friendship, risking the ire of those who just want me to get on with it and stop all the personal stuff, or whether to intersperse some comments seamlessly in my text but possibly finding no occasion to pay certain debts which definitely need paying.

It has also forced me to consider the tricky question of whether to use powerpoint or not? So far as I can see, if traditions can take hold rather quickly, it has become rather traditional for inaugural lectures in our part of the College of Humanities and Social Sciences to be accompanied by a rather funky powerpoint presentation (ranging from
pictures of pretty Austrian towns and Germans drinking beer with great panache, to
colourful book covers and evidence from public opinion surveys about national foreign
policy choices, for example). On the other hand, there does not appear to be a tradition of
using powerpoint in Europa town-gown lectures. So, which way will I go on this
question? I will leave you to ponder for a while whether what you see behind me is
merely an attractive and colourful backdrop, reminding you of the title of my lecture in
case I wander too far off the point, or instead just the first of a series of exciting and
illuminating slides offering images and diagrams which will make my points far more
eloquenty than the spoken word alone.

On the question of thanking those without whom I would not be here (whether for
personal or professional reasons), I have decided to go with the ‘both/and’ solution.
Forgive me now if I use just a couple of moments of the time I have available (and yes,
this won’t be too long, never fear) for some personal reflections, before launching into
the substantive text of my lecture. However, as I have chosen a rather broad topic for my
reflections, a topic which allows me to range across most, if not quite all, of my research
interests in the last ten years or so, it should not prove too difficult to weave some of my
debts relating to my professional development into the text of the lecture. We shall see.

But first let me just mention that I am delighted to be here as the middle of a three
generational sandwich of Shaws. It is great that my father, Robert, is able to be here; so is
my son Leo who, as many of you already know, is a student elsewhere in the College of
Humanities and Social Sciences. In addition, my partner Alf Thomas is here as well,
although he is hardly a stranger to these walls since he is likewise a part time student at
the university and an enthusiastic attendant of some of the many lectures and other public
events which the University puts on. We could hardly, as a family, be more integrated
into the University! I am also touched that my close friend Sally Wheeler has come over
from Belfast. Like me, Sally has held three chairs, in fact come to think of it we have
worn out an entire dining set between the two of us; perhaps my finally getting round to
giving an inaugural will inspire her to do likewise in Belfast. If so, I look forward to
reciprocating her attendance here, but I have no intention of traveling over by ferry in order to do so as she has done in order to get here.

When I came to Edinburgh at the beginning of 2005, I was not really wholly a stranger to the place. I first came here for a workshop in the Law School in November 1994 and it’s worth mentioning that my first sight of my now co-director of the Europa Institute Drew Scott was of him laying out the lunch for our workshop participants. Sometimes I think that Drew thinks he is destined always to be ‘laying out the lunch’ metaphorically speaking, but that massively underestimates his continuing contribution to the health of the Europa Institute. Of the participants in the workshop, apart from the home team, only Tammy Hervey has been able to be here today. At the point where the personal shades into the professional, I am also honoured that two former holders of this Chair are present in the audience, David Edward and William Paterson. Since another holder of the Chair, John Usher, gave me my first job at University College London in 1983, it is with interest that I note that it is only my distinguished forerunner John Mitchell, whose seminal articles on the future of the British Constitution after the UK joined what were then the European Communities I read as a student, whom I have not had the honour and pleasure to meet amongst the previous holders of the Salvesen Chair.

I read John Mitchell’s articles such as ‘The Sovereignty of Parliament and Community Law: The Stumbling-Block that isn’t There’ in the context of learning Constitutional Law. They offered an intriguing vision, hinting at a world in which the legal regulation of national sovereignty was not the dominant leitmotiv, although I suspect they were given to us to read by our constitutional law teachers as indicators of where one can go wrong, not where one can make a career. Unlike most of my contemporaries of the time, I chose to follow up the insights of constitutional law by studying European Economic Community Law as an undergraduate, and then moved on to study for a masters in European Law in Brussels at the insistence of my Director of Studies Basil Markesinis. I’ve hardly strayed from that fold since. I seem to recall getting a bit bored with EC law during the 1980s, but that coincided with a period at the University of Exeter when I was so far down the queue of EC lawyers that I was lucky to be given a couple of EC law
tutorials to teach, and I spent most of my time teaching tort and contract, and getting quite interested in law and feminism and, although it is hard to recall precisely why any more, medical law. Anyway, I am delighted that a few friends from the Exeter University women’s group are here today, Carol Howarth and Helen Kay. Moreover, my interests in gender issues and the law have persisted to the present day, with a recent project looking at the recent evolution of EU policies on gender and equality issues. But what happened after the Single European Act came into force and the single market programme was launched, coupled with a move to Keele where I was called upon to take primary responsibility for EC law courses soon put paid to that brief moment of ennui with EC law, although I did take another fairly substantial detour via the law of contract again in the 1990s, in order to produce a book with Sally Wheeler. It is great that Richard Hart, the publisher who set both of us on our way, is here in the audience today.

Anyway, somewhere along the line, I think it was around the mid-1990s, my interests in the EU and EU law crystallized above all around what has become known as the European Union’s ‘constitutional question’ or questions, namely

- Does the European Union need a constitution?
- Does it have a constitution?
- What sort of constitution does it need, or have?
- And in particular what sort of constitution is needed for what sort of European Union?

Big questions, of course, and not ones to which I have satisfactory answers, or certainly not answers which I could present in the short time available here. In fact, I fear I wouldn’t have the insights to match some of the other distinguished contributors to this lecture series such as Neil Walker and Neil MacCormick himself on that score. Keep the last of the four questions in mind, though, as I hope to return to it at the end. Luckily, over the years I have had been able to follow two lines of enquiry which have offered me the opportunity to take a more focused look at some of the these questions, in a way which is perhaps more suited to my rather empirically inclined mind. The first of these was the opportunity given to me by John Pinder to design and direct a study on constitutionalism, federalism and the reform of the European Union for the Federal Trust,
from 2001 onwards, which just happened to coincide, happily, with the European
Union’s most intensive period of self-conscious constitution-designing yet. This was the
Convention on the Future of Europe, which body was responsible, under the Presidency
of former French President Valery Giscard d’Estaing, for responding to a set of
challenges set out by the European Council in its Laeken Declaration of December 2001.
Rightly or wrongly, the European Convention interpreted those challenges as involving
the drafting of what came to be known as the Constitution – strictly speaking the draft
Treaty establishing a Constitution for Europe. *En passant*, I would note that while today
might be a big day for me, as one group of LLM students reminded me the other day,
tomorrow would, in other circumstances, have been a very big day for the European
Union. Tomorrow would have been the day, had all gone swimmingly for the ratification
process (oh how unlikely that always was!), that the EU’s so-called Constitution, or – as I
would prefer it – Constitutional Treaty, would have come into force. 1 November 2006.
That was not to be.

Anyway, here a couple of self-indulgent bits of nonsense, first a screengrab of the archive
of the Federal Trust’s European Constitution project, in case there is anyone in the
audience (Anna Verges or Brendan Donnelly?) who feels nostalgic about it, and second a
picture of John Pinder receiving a lifetime award at the UACES Conference in Zagreb in
September 2005, from John Kerr (formerly Secretary General of the European
Convention and now much more gainfully employed as UACES’ Honorary President and
regretfully unable to be here today) with yours truly looking a bit dippy in the
background, as Chair of the Association. UACES, for those many in the audience who
are not aware of this, is the University Association for Contemporary European Studies,
and if you want to join the current Chair and the Executive Director are in the audience
and ready and waiting with application forms…
Anyway, getting back to business. If you recall, I noted that I had two outlets for preoccupations with the EU’s constitutional questions. The outlet has addressed the issue of citizenship in the EU context, and in particular the question of the circumstances under which EU law grants rights to EU citizens to vote in certain elections in the Member State in which they reside, regardless of nationality. Thus, to give an example, the many Poles who are resident in Edinburgh and elsewhere in Scotland, can vote in the local elections next May, provided they register to vote in the normal way.

I’ll come to that point in a moment, but first I want to take a brief detour back to the Convention, in order to connect the issue of the Union and ‘its citizens’, with a view then to discussing the issue of political rights.

It was said in the Laeken Declaration, which I mentioned a moment ago, that:

The Union needs to become more democratic, more transparent and more efficient. **It also has to resolve three basic challenges: how to bring citizens,**
and primarily the young, closer to the European design and the European institutions, how to organise politics and the European political area in an enlarged Union and how to develop the Union into a stabilising factor and a model in the new, multipolar world. In order to address them a number of specific questions need to be put (emphasis added).

This is another rendering of ‘bringing Europe closer to the citizen’ rhetoric, which the European Institutions are fond of making us overdose on quite regularly. I want to contend that this is fundamentally the wrong question to start with in a multilevel European Union.

This is not least, because it seems to assume that this relation, between the Union and the citizen directly can become meaningful in itself as a primary political relation. I doubt this, both empirically and also analytically, in terms of the current state of constitutional and political relations. For we also need to take into account both the relevance of the national level of politics and also the subnational level, especially in a state such as the UK, which has what I think we should now call an evolving federal system of governance. Moreover, empirically, have a look at some figures from a recent Eurobarometer survey which make rather depressing reading for those such as myself who think that looking at citizenship in the EU context is a worthwhile subject of research.

In recent Eurobarometer Survey (Eurobarometer 251), when respondents across the EU Member States are asked to nominate two issues from a list of six which they think would strengthen their feeling about being a European citizen, across the EU a certain number will spontaneously state that they do not want to be a European citizen.

EU25 average – 8%
UK – 25%
Austria – 13%
Germany 9%
France – 5%
Italy – 3%
Slovakia – 2%
Lithuania – 1%
Poland – 1%
And the other Member States fall at various points in between.

Of course, these are very limited samples of respondents, but it is certainly a cautionary poll. Remember, the respondents were not offered the opportunity to say they didn’t want to be European citizens. They volunteered that option spontaneously when offered seven alternatives. It is always possible that the fact that more people volunteered a spontaneous response in the UK tells us more about the stroppiness of people who respond to surveys in the UK, certainly in comparison to those in Poland, than it does about European Citizenship. Certainly, it is very hard to say what European citizens are, since most people identify first and foremost with other persons associated with their locality, their city, their region, or their state, or with some other social or political group (e.g. those sharing the same disability or those who support the same political ideology), than they do with the European Union. However, as a minimum one can say that citizens of the European Union (which at the present time is basically another way of saying the collectivity of the nationals of the Member States) do have some rights and obligations under European Union law, and it is sometimes suggested that they should have more than they do at present.
It is interesting to see in the same survey the example of ‘being able to vote in all elections in the Member State in which you reside’ cited by respondents as the third most popular means of strengthening the feeling of being a European citizen, when respondents are asked to cite two reasons from a given list (or to provide another reason spontaneously). Only the creation of a European social welfare system and the adoption of a European constitution come higher. Inevitably, of course, the Commission made much of the European constitution coming second top.

But I am more interested in the issue of voting. For when one thinks about it, it does seem a little irrational, does it not, that the EU has such an active policy on mobility, it does so little for political rights. Under EU free movement law, nationals of the Member States are encouraged to move, but not necessarily to make any given act of mobility permanent (thus the same person might migrate to a different state first as a student, then for employment or family reasons, and finally for retirement). Consequently, naturalization and adoption of the host national citizenship is not necessarily a good option for such ‘free movers’. Moreover, the EU has recently created a category of ‘permanent resident’ for those resident five years or more; such persons are protected against expulsion from
the host state except on serious grounds of public policy or public security, and they cannot be expelled for becoming dependent upon the state. Finally, EU law provides a general principle of non-discrimination on grounds of nationality which protects all EU citizens when in another Member State, regardless of whether they are there permanently or not.

And yet, as the same time, the EU provides only very limited political rights. It provides, under Article 19 EC, the right to vote and stand in European Parliament and local elections ‘under the same conditions as nationals’. However, in practice, becoming registered and exercising the right to vote may be very difficult and rates of participation using these rights are very low. Beyond that, EU law provides nothing on national elections and ‘regional’ elections. Moreover, in some Member States non-nationals remain restricted in relation to political participation – e.g. they may be unable to participate fully in political parties. To put it another way, if – as has generally been the case over the last twenty years or longer – 1.5% of the population of the Member States are at any one time resident in a Member State other than the one of which they are a national, then that is a lot of people perhaps permanently and structurally excluded from the possibility of voting in national elections, that is the form of elections that most people would regard as the ‘gold standard’ of political participation. Even on some quite conservative estimates provided by the Commission around the time of the 2004 enlargement, this amounted to around 6.5m voters. That is, rather more than the electorate of Scotland, and quite a lot of the small and even almost medium-sized states of the European Union.

Of course, the desire to be able to vote in all elections ‘organised in the Member State where they live’ is a demand posed in rather different numbers by EU citizens. Again, the Eurobarometer figures provide some insight. Thus we see it varies between 50% and 14%.
Denmark – 50%
Ireland – 45%
Luxembourg – 45%
Malta – 40%
Austria – 16%
Germany – 15%
Lithuania – 14%
UK – 14%

But 21% across the board is quite a sizeable number ranking voting in all elections rather high in their list of preferred options for European citizenship. It’s worth noting, as an aside, that in a separate question posed by Eurobarometer about preferred means of making one’s voice heard by decision-makers, voting in elections was cited by more than 50% of respondents across the EU as one of their two preferred means. Thus people still
think the traditional methods are best, even though they are not always so terribly good at exercising these rights once they have them.

At the present time, the availability of electoral rights in the EU and its Member States is an extraordinary and quite confusing patchwork. Forgive me whilst I run through the various options.

So…

All EU citizens can vote and stand in local elections wherever they are resident; same conditions as nationals
All EU citizens can vote and stand in EP elections wherever they are resident; same condition as nationals
That is, they have Article 19 equal treatment right already referred to.

But is the right to vote in EP elections and EU citizenship right? Curiously, it is not mentioned in the Treaty as such, although it is perhaps implicit in the system of the Treaty. Advocate General Tizzano in a recent case involving EU citizens voting in Aruba certainly suggested it was, and indeed went further, stating that the right to vote for the EP is perhaps the most important of EU citizenship rights.

Member States themselves retain many powers regarding the exercise of this putative right to vote in the European Parliament. For example, Member States can restrict the right to vote by applying the usual age and competence criteria, and they can also choose whether to give it to those citizens who are resident outside the national territory. However, the Aruba case establishes that national restrictions on the right to vote have to be objectively justified. In the Aruba case, the Netherlands found itself defending an irrational rule. The Netherlands had a rule which prevented Netherlands nationals (who are EU citizens) voting when they are in Aruba. Aruba, an overseas territory of the Netherlands, is not part of the EU. The Netherlands chooses not to hold EP elections there (where in a similar type of case, by way of contrast, France does organise EP elections). However, Netherlands nationals can vote in EP elections if they leave the
Netherlands, and that includes Arubans who leave Aruba. The result is bizarre. An Aruban can suddenly vote in EP elections if she leaves Aruba and goes and lives in Venezuela, just across the water from Aruba. Interestingly, the case which brought this issue to the Court of Justice gave the Court its first opportunity to decree that in some circumstances, e.g. where elections to a European institution are concerned, the Court can in fact look at the treatment of EU citizens within the Member States. In this case, the Court said that there was a possible breach of the general principle of equality, because of the workings of the Netherlands expatriate voting rules, and thus it required the Netherlands to justify those rules.

Are there any other rights to vote under EU law? The answer is no. There are no rights for EU citizens to vote in national or regional elections under EU law. There are no rights for third country nationals to vote in any elections in the Member States under EU law. However, Member States are not prevented from extending rights to TCNs, including in European Parliament elections, or from extending other rights to vote to EU citizens.

So…what does national law provide?

Fifteen Member States provide at least some electoral rights in local elections for third country nationals
Denmark, Finland, Sweden (the Nordic connection)
Netherlands, Belgium, Luxembourg (the latter two catching up somewhat belatedly with the Netherlands which was one of the first states to institute local electoral rights for third country nationals)
Ireland (which has long had such rights, although they were never very salient until the 2004 local elections)
UK (see in a moment)
Portugal, Spain (in the latter case these are minimal; in fact, they are only for Norwegians)
Estonia, Lithuania (to protect the Russian minority in particular)
Slovakia, Hungary, Slovenia (as cases where new Member States have adopted what one might term ‘European best practice’ in relation to electoral rights).
It is interesting to see here two examples of the types of posters which national governments provide to encourage non-nationals to vote.

In the on the left, the flags might provide a trigger for those who have entitlements in Portugal. However, in both cases one can only hope that the governments do provide the documentation in languages other than the one of the host state.

It is also worth noting that throughout the world the question is being raised about whether electoral rights should be given to non-nationals. Below is a picture of a demonstration recently in New York City held by those campaigning for non-nationals to be able to vote at the local level in that city.
I want to devote a little time to the peculiar case of the UK. The UK provides the right to vote and stand in all elections for Irish citizens, and for Commonwealth citizens (incl. citizens of Malta/Cyprus), in the latter case subject only to immigration status. It also grants the right to vote to EU citizens in elections to the devolved authorities of the UK (Scotland, Wales, Northern Ireland, Mayor of London) and associated referendums (except the one in 1999 in Northern Ireland, where the electoral register for the Westminster elections was used). It is thus important to recall the subnational level referred to above. The UK is peculiar in giving these ‘regional’ rights to EU citizens, but it is interesting to note that I have encountered some interest whilst doing my research from Spanish scholars who have wanted to present this option for reform in the context of the Spanish autonomous communities to their governments. I would note that this is yet another example of the asymmetries of the UK’s current constitutional settlement, but that is a can of worms which I refuse to open on this occasion.

Meanwhile Ireland allows UK citizens to vote in Dail elections, but not to stand for election. Also UK citizens cannot vote in referendums or Presidential elections. However, a constitutional amendment of 1984 and consequential legislation mean that on condition of reciprocity, Ireland could designate the nationals of other Member States as able to vote in Dail elections. The trigger for such action would need to be unilateral action on the part of another Member State, or an agreement between Ireland and another Member State to give electoral rights in national elections to each other’s citizens. It is not inconceivable that this could happen in the future.

In case you are interested, here are two tables presenting all this information. I won’t dwell on it further now.
Table 1: Summary of the position on non-nationals voting in the Member States of the EU 15

<table>
<thead>
<tr>
<th></th>
<th>Local elections</th>
<th>National elections including regional/state elections</th>
<th>COE?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EU citizens</td>
<td>TCNs</td>
<td>EU citizens</td>
</tr>
<tr>
<td>Austria</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Belgium</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Denmark</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Finland</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>France</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Greece</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ireland</td>
<td>Yes</td>
<td>Yes</td>
<td>UK citizens</td>
</tr>
<tr>
<td>Italy</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Portugal</td>
<td>Yes</td>
<td>Some</td>
<td>Some</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes</td>
<td>Some</td>
<td>No</td>
</tr>
<tr>
<td>Sweden</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Yes</td>
<td>Commonwealth citizens</td>
<td>Irish, Cypriot and Maltese citizens for all elections; all EU for 'regional' elections</td>
</tr>
</tbody>
</table>

Table 2: Summary of the position on non-nationals voting in the EU 10

<table>
<thead>
<tr>
<th></th>
<th>Local elections</th>
<th>National elections including regional/state elections</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EU citizens</td>
<td>TCNs</td>
<td>EU citizens</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Estonia</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Hungary</td>
<td>Yes</td>
<td>Yes</td>
<td>Regional</td>
</tr>
<tr>
<td>Latvia</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Malta</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Poland</td>
<td>Draft</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

A few words of conclusion.
Back in 1975, the Commission commented that ‘complete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a European Union.’

As a normative position that may or may not be right. That is not ultimately for me to say. It is certainly not so far the case, and so far as concerns the growth potential of EU law itself, I am skeptical indeed as to how many more rights we can expect to see EU citizens gaining in the future. I question the decisional capacity existing within the framework of the EU at present in relation to the evolution of citizenship on a top down basis.

But EU law is not the only way. And that brings me back to my desire to link citizenship and constitutionalism and to plead for a consistently multi-level interpretation of the EU constitutional framework. Not everything that feeds into this constitutional framework need necessarily stem directly from the EU itself. That is not to say that the Court of Justice has not already made a substantial contribution to the development of EU citizenship. Indeed it has, and most recently with its two cases in September 2006 on voting rights in the European Parliament is has continued its trend of handing down challenging judgments. But, there are also manifold examples of how national courts have fed directly into the construction of the EU’s practices of constitutionalism and polity-building, and not just when they have sought to contradict plainly what the ECJ itself has said. That point can extend also to the political institutions, as well as the courts. It seems to me that the construction of political rights in the context of the EU, even if this occurred at the national level, would be manifestly related to the existence of the EU, and its success as a political and economic union. Moreover, despite the difficulties with European citizenship, in fact the Eurobarometer survey shows that it must be quite widely accepted that the right to vote should inhere as an aspect of citizenship. If this were to develop, directly or indirectly, at the national level because of the diffuse impact of EU, then I would see this as an important contribution to the EU’s constitutional future. This, truly, would address the question of what sort of constitution
for what sort of European Union highlighted earlier in the lecture. The answer? A mixed constitution for a mixed union.