



# A Constitutional Order of States?

Essays in EU Law in Honour of Alan Dashwood

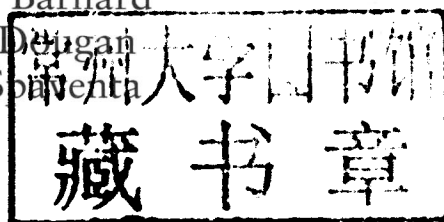
EDITED BY ANTHONY ARNULL, CATHERINE BARNARD,  
MICHAEL DOUGAN & ELEANOR SPAVENTA

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Alan Dashwood

Edited by

Anthony Arnall  
Catherine Barnard  
Michael Dugan  
Eleanor Spaventa



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## A CONSTITUTIONAL ORDER OF STATES?

This collection celebrates the career of Professor Alan Dashwood, a leading member of the generation of British academics who organised, explained and analysed what we now call European Union law for the benefit of lawyers trained in the common law tradition. It takes as its starting point Professor Dashwood's vivid description of the European Union as a 'constitutional order of states'. He intended that phrase to capture the unique character of the Union. On the one hand, it is a supranational order characterised by its own distinctive institutional dynamics and an unprecedented level of cohesion among, and penetration into, the national legal systems. On the other hand, it remains an organisation of derived powers, the Member States retaining their character as sovereign entities under international law. This theme permeates both the constitutional and the substantive law of the Union. Contributors to the collection include members of the judiciary and distinguished practitioners, officials and academics. They consider the foundations, strengths, implications and shortcomings of this conceptual framework in various fields of EU law and policy. The collection is an essential purchase for anyone interested in the constitutional framework of the contemporary European Union.

# Preface

This collection of essays celebrates the work and career of Professor Alan Dashwood CBE QC, who was a leading member of the generation of British academics who took an interest in European Union law before the accession of the UK in 1973. Having taught themselves the subject, Alan and his leading contemporaries then set about organising, explaining and analysing, for the benefit of lawyers trained in the common law tradition, a legal order heavily influenced by the civil law tradition of continental Europe.

Born in South Africa during the Second World War, Alan began his academic career in 1966 at the University of Glasgow and his earliest publications were on criminal law. In 1970, he began teaching European Union law and has specialised in that subject since he served as Legal Secretary from 1978 to 1980 to J-P Warner, the first British Advocate General at the European Court of Justice. Alan was the founding editor of the *European Law Review*, launched in 1975 and now one of the leading scholarly journals covering the law relating to European integration. Five years later, he published (with Derrick Wyatt) *The Substantive Law of the EEC*, a pioneering work which for the first time identified, for a common law readership, the salient features of the EU's substantive law (as opposed to the law relating to its institutions and decision-making processes). Now entitled *Wyatt & Dashwood's European Union Law*, the fifth edition by a team of authors (including three of us) was published in 2006.

The first edition of Wyatt & Dashwood was completed while Alan was at the European Court of Justice, but in the year of its publication he took up a chair in law at the University of Leicester, where he served as Head of Department from 1984 to 1987. While at Leicester, the close relationship Alan has always maintained with his students was underlined on a visit to the European institutions. During a long coach ride, the students organised a contest to see who could imitate most convincingly Alan's characteristic style of delivery. Ever competitive, Alan entered the contest himself and was crestfallen when he managed to come only third.

In 1987, Alan left Leicester to become one of four Directors in the Legal Service of the Council of the European Union. There he led an international team of lawyers responsible for giving oral and written advice to ministers, the Committee of Permanent Representatives and Council Working Groups, and for representing the Council in proceedings before the Union Courts. His portfolio initially comprised institutional questions; the Union budget and financial resources; social policy; cooperation with the African, Caribbean and Pacific countries; and staff matters. He



advised the Presidency in the annual budget negotiations with the European Parliament and helped to devise and implement the new system of septennial financing, which was initiated with the 'Delors package' in 1988. In the negotiations on 'Political Union', which culminated in the Maastricht Treaty, he advised on institutional matters. For nearly three years he was in charge of the legal aspect of agriculture and fisheries, and then moved on to external relations, where he was involved in the final stage of the Uruguay Round of multilateral trade negotiations and preparing the implementation of the WTO Agreement. He was responsible for the legal aspect of the common foreign and security policy when it was established post-Maastricht, and was the first legal advisor to the Political Committee. He was also put in charge of the drafting of the 1994 treaty on the accession to the EU of Austria, Finland and Sweden.

In 1995, Alan left the Council to become the first Professor of European Law at Cambridge and Fellow of Sidney Sussex College. He immediately assumed the Directorship of the Centre for European Legal Studies at Cambridge, a post he held until 2000. It was during that time that he founded the *Cambridge Yearbook of European Legal Studies*. He also inaugurated the annual Mackenzie-Stuart Lecture and a series of occasional papers. The conferences he organised, often reflecting interests he had developed while at the Council, became highlights of the academic calendar and led to a series of major publications: *Reviewing Maastricht: Issues for the 1996 IGC* (1996); *The Principle of Equal Treatment in EC Law* (edited with S O'Leary) (1997); *The General Law of EC External Relations* (edited with C Hillion) (2000); *The Future of the Judicial System of the European Union* (edited with A Johnston) (2001). From 1995 to 2008, Alan was also one of the joint editors of the *Common Market Law Review*.

All this might seem more than enough to fill a professional career. However, having been called to the Bar in 1969, in 1997 Alan became a tenant at 2 Harcourt Buildings (now Henderson Chambers) in the Temple and started to build a busy practice. He acted for the UK in several leading cases before the Union Courts, including *Pfeiffer*, *Advocaten voor de Wereld* and *Kadi and Yusuf*. He was made a Bencher of the Inner Temple in 2002. In the same year, at the invitation and with the support of the Foreign Office, Alan produced, with the help of a group of colleagues at Cambridge, a Draft Constitutional Treaty of the European Union, as a contribution to the work of the Convention on the Future of Europe. The draft was submitted to the Convention by Peter Hain MP, then the Minister for Europe, in 2003. It was subsequently published in the *European Law Review*.

Alan is frequently invited to give oral or written evidence to Parliamentary Committees on issues of EU law and to advise Government Departments on EU law matters. He also advises governments and parliaments of other Member States, as well as EU institutions. He was

appointed CBE in 2004. Alan retired from his chair at Cambridge at the end of the 2008–09 academic session. However, he still plays an active part in the affairs of the Law Faculty and Sidney Sussex College and continues with his practice at the Bar, being made a QC in 2010.

One of Alan's most insightful contributions to the intellectual understanding of the distinctiveness of the European Union is his vivid description of it as a 'constitutional order of states', a phrase he coined in the first of his four magisterial position papers in *Reviewing Maas-tricht*. He intended that phrase to capture the unique character of the EU as a supranational order characterised by its own distinctive institutional dynamics, and by an unprecedented level of penetration into the national legal systems, yet which remained an organisation of only derived and limited powers, the Member States retaining their character as sovereign entities under international law. Although not uncontroversial, the phrase provides an invaluable conceptual tool for understanding the process of European integration. This collection takes the idea of 'a constitutional order of states' as its starting point, exploring its strengths and shortcomings in various fields of EU law and policy organised around the following broad themes: the EU's constitutional and judicial fabric, European substantive law and Europe's role in the wider world. These themes reflect some of the most important points of tension and development in the constitutional framework of the contemporary European Union as well as Alan's longstanding interests.

The editors were greatly assisted in the preparation of this collection for publication by Michelle Houston, who went through each contribution to check for inconsistencies of style that we ourselves had missed, and to all at Hart Publishing, who displayed their usual enthusiasm, forbearance and attention to detail. We are grateful to them all for their help. But our primary debt of gratitude goes to our contributors. Drawn from a range of professional backgrounds, all have close connections with Alan: he offered some their first job; some had their first article published by him; for some he supervised their PhD. Several of them battled through snow and ice to deliver drafts of their chapters at a lively seminar organised by the Centre for European Legal Studies at the University of Cambridge in December 2009. Our overriding memory of that seminar is the praise heaped on Alan by those who attended, not only for his intellectual contribution to the discipline, but also for his wit, warmth, stylish sense of dress and taste in exquisite whiskies.

AA  
CSB  
MD  
ES

October 2010

# Farewell and Thanks to Alan

It is appropriate in a collection such as this to say something about Alan Dashwood's contribution to European Union legal studies in his capacity as member of the Editorial Board of the *Common Market Law Review*.

We have to go back 16 years in time, to an announcement published in the December 1994 issue of the *Review*: 'The Editors and publishers are pleased to announce that Professor Alan Dashwood and Professor Jacqueline Dutheil de la Rochère have joined the Editorial Board'. The following issue suddenly ran to 383 pages—about double what was usual in those days. Now this is really a paradox—as this is the man whose succinctness is exemplary. My favourite e-mail from Alan ran to all of two words: 'Who he?' This was closely followed in brevity by: 'It's fine. Love Alan.'

In order to look at Alan's achievements in this area, we need to ask ourselves what a member of the Editorial Board does. He or she helps determine general policy, suggests authors and topics, assesses material received, and occasionally writes pieces, signed (if they are case notes and articles) and unsigned (if they are editorials)

These activities can be grouped naturally under three headings: Institutional balance; The Cambridge School; Passion.

## INSTITUTIONAL BALANCE

In order to understand what lies behind the term institutional balance, one needs to know that, for many years, the *Common Market Law Review* had a special relationship with the Commission and its legal service. Specifically: three consecutive Deputy Directors-General of the Legal Service of the European Commission were on the Editorial Board. It was of course not Alan's intention to break up this happy marriage—but somehow to transform it into a *ménage à trois*. His thorough understanding of the nature of the European Community (though now we must get used to saying Union), where Commission and Council both play such important parts, led us to upgrade the input of the Council, directly and indirectly. Authors, points of view, even a member of the Editorial Board were sought from that august institution and given the attention they deserve. Linking this to the discussions on 'institutional rebalancing' as a result of the Lisbon Treaty, we can ask: does an increase in the influence of one Institution automatically lead to a decrease in influence of another? Did more influence from the Council mean less for the Commission?—it is open question! But in terms of input for the *Review* it was certainly added value.



## THE CAMBRIDGE SCHOOL

This goes without saying! After Alan joined the Board, the *Review* soon published contributions by Michael Dougan and Christophe Hillion (they also joined the Editorial Board), and by Eleanor Spaventa, Oke Odudu, Angus Johnson, Catherine Barnard, Albertina Albors Llorens—all of whom were or are at Cambridge. Coincidence? No way! Alan inspired them all, and inspired them in particular to write for the *Review*.

## PASSION—WITH STYLE

Certain of Alan's email reactions to articles and case notes indicate that legal issues could arouse strong feelings—though he might express this with delicacy.

- Oh dear! You know that the word 'governance' makes me reach for my revolver.
- This article is full and clear. A sound piece on an important topic (though one that leaves me somewhat cold). Eminently publishable.

But I should also mention the long telephone calls . . . Hours could pass discussing articles or judgments. While Alan can be as objective as any lawyer may need to be, he cared deeply about certain developments, certain judicial decisions—particularly of the Court of Justice. These were not just 'interesting', but could arouse fury. I can mention the example of *Mangold*—a case we have still not heard the last of!—where Alan was scathing about the Court's unwillingness to accept that where directives are invoked in horizontal situations, national courts will simply have to apply domestic provisions even if they are incompatible with EU law.

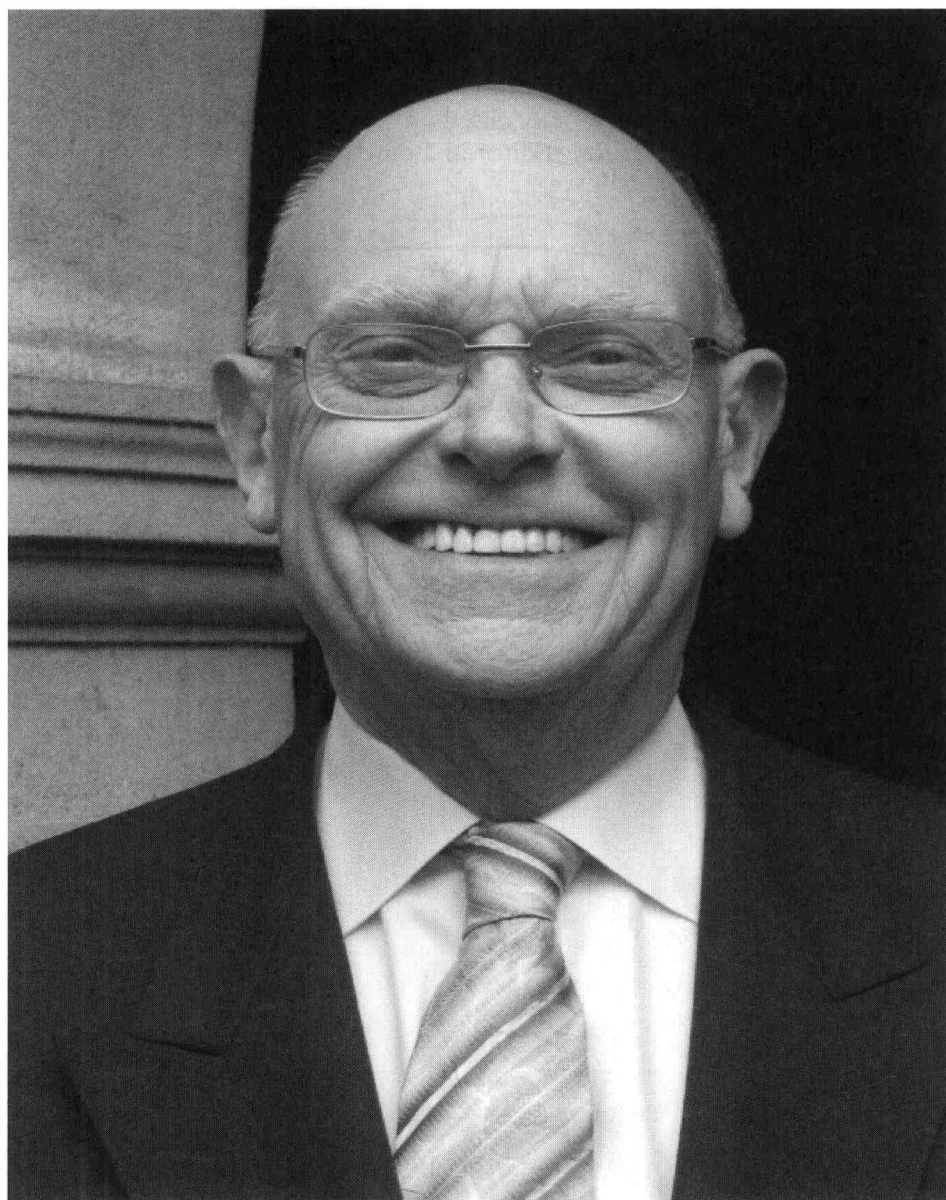
Alan's own publications in the *Review* are quite sparse, in terms of signed articles—since he had to spread his writing over the *European Law Review*, the *Cambridge Yearbook*, countless books, and so on. He gave us some brilliant editorial comments—in the last years, particularly in connection with the whole Treaty reform process, on which he was not afraid to hold clear opinions.

In February 2004, an editorial comment he drafted already revealed unconditional support for the Treaty reform process, and a clear rejection of suggestions to muddle through with the Treaties in their Nice versions. He identified early on the essential elements which needed to be retained in any new agreement replacing the Constitutional Treaty: a full-time president, a foreign minister, the extension of qualified majority voting in the Council, and absorption of what was left of the third pillar by the Community (whatever its name). He struggled with the problems which so-called depillarisation might bring—should the principle of primacy also

apply within the former second pillar? Could infringement proceedings be started against Member States for failure to fulfil their obligations in the area of the common foreign and security policy?

Certainly, Alan could not be accused of failing to fulfil his obligations as a member of the *CMLRev* Editorial Board.

Alison McDonnell



# List of Contributors

**ALBERTINA ALBORS-LLORENS** is a University Senior Lecturer and Fellow, Girton College, University of Cambridge.

**ANTHONY ARNULL** is Barber Professor of Jurisprudence, University of Birmingham.

**CATHERINE BARNARD** is Professor of European Union Law and Employment Law and Fellow, Trinity College, University of Cambridge.

**JOXERRAMON BENGOTXEA** is Professor of the Philosophy of Law at the University of the Basque Country.

**MARISE CREMONA** is Head of the Law Department, Co-Director of the Academy of European Law and Professor of European Law at the European University Institute.

**GEERT DE BAERE** is Professor of EU Law at the University of Leuven Law Faculty and the Leuven Centre for Global Governance Studies.

**MICHAEL DOUGAN** is Dean of the Liverpool Law School and Professor of European Law at the University of Liverpool.

**JACQUELINE DUTHEIL DE LA ROCHERE** is Professor at the Université Panthéon-Assas (Paris II).

**DAVID EDWARD** was Judge of the European Court of Justice 1992-2004. He is now Professor Emeritus of the University of Edinburgh.

**JONATHAN FAULL** is Director General at the European Commission (DG Justice Freedom and Security).

**BRUNO GENCARELLI** is a member of the Legal Service of the European Commission.

**LAURENCE GORMLEY** is Professor of European Law and Jean Monnet Professor at the University of Groningen.

**ROSA GREAVES** is Professor at the Universities of Glasgow and Oslo.

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**JOSÉ A GUTIÉRREZ-FONS** is Legal Assistant at the European Court of Justice.

**JONI HELISKOSKI** is an official at the Ministry for Foreign Affairs, Helsinki.

**CHRISTOPHE HILLION** is Professor of European Law, Universities of Leiden and Stockholm and the Swedish Institute for European Policy Studies.

**MARGOT HORSPOOL** is Professor of Law at Queen Mary, University of London. She is also a Professorial Fellow in European Law at the British Institute of International and Comparative Law.

**FRANCIS JACOBS QC** is Professor of Law at King's College London. He was previously Advocate General at the European Court of Justice (1988-2006).

**ANGUS JOHNSTON** is CUF lecturer at the University of Oxford and a fellow at University College Oxford.

**PANOS KOUTRAKOS** is Professor of European Law, University of Bristol.

**KOEN LENAERTS** is Judge and President of Chamber at the European Court of Justice and Professor of European Union Law at KU Leuven.

**MARC MARESCEAU** is Professor of European Law, European Institute, Ghent University, Faculty of Laws, Jean Monnet Centre of Excellence.

**ALISON MCDONNELL** is Associate Editor, Common Market Law Review.

**INGOLF PERNICE** is Professor and Director of the Walter Hallstein Institute for European Constitutional Law (WHI) at the Humboldt-Universität zu Berlin.

**JEAN-CLAUDE PIRIS** is the Legal Counsel of the European Council and of the Council of the European Union, Director General of the Legal Service of the Council.

**RICHARD PLENDER** is a Judge at the High Court of England and Wales.

**MALCOLM ROSS** is Professor of European Law, University of Sussex.

**DAVID SCANNELL** is a Barrister at Brick Court Chambers, London.

**ROBERT SCHÜTZE** is Reader in European Union Law, University of Durham.

**ELEANOR SHARPSTON** is Advocate General at the Court of Justice of the European Union.

**PIET JAN SLOT** is Professor of European Law, University of Leiden.

**ELEANOR SPAVENTA** is a Reader at the University of Durham and Director of the Durham European Law Institute.

**JOHN R SPENCER** is Professor of Law at the University of Cambridge, Fellow at Selwyn College and Co-Director of the Centre for European Legal Studies.

**CHRISTIAAN TIMMERMANS** is Pieter Sanders Professor of Law, University of Rotterdam, and a former Judge at the European Court of Justice.

**ANTONIO TIZZANO** is Judge at the European Court of Justice.

**ROBIN WHITE** is Professor of Law at the University of Leicester. He also holds a part-time judicial appointment as a Judge of the Upper Tribunal.

**DERRICK WYATT** is a QC, an Emeritus Professor of Law in the University of Oxford, and an Emeritus Fellow of St Edmund Hall, Oxford. He is currently a Visiting Professor of Law in the University of Oxford.



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