SCRITTI IN ONORE DI
GIUSEPPE TESAURO

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LA TUTELA GIURISDIZIONALE NELL'UNIONE EUROPEA

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PARTE PRIMA

DAVID EDWARD*

The Contractual Foundation of Member States' Obligations to the Individual: Advocate General Tesauro's Opinion in *Brasserie du Pêcheur and Factortame*

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1. *Introduction*

The contribution to the evolution of European Community law of Advocate General Giuseppe Tesauro, *nostro caro Beppi*, needs no emphasis from me. His opinions, marked by his careful scholarship and wry sense of humour, speak for themselves. One of the best and most influential of his opinions was given in the landmark case of *Brasserie du Pêcheur & Factortame* (hereafter «*Brasserie du Pêcheur*»)[1]. This opinion, together with his opinions in *BT*[2] and *Dillenkofer*[3], and that of Advocate General Léger in *Hedley Lomas*[4], provided the analytical basis for the Court's leading judgment in *Brasserie du Pêcheur* and the consequential judgments in the other three cases.

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[1] ECJ, 5 March 1996, *Brasserie du Pêcheur v Germany* and *The Queen v Secretary of State for Transport,* ex parte *Factortame Ltd and others,* Joined Cases C-46/93 and C-48/93, I-1131.

[2] ECJ, 26 March 1996, *The Queen v H.M.Treasury*, ex parte *British Telecommunications plc,* Case C-392/93, I-1631.

[3] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer & Others v Germany* [1996] ECR I-4845.

[4] ECJ, 8 October 1996, *The Queen v Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd,* Case C-5/94, I-2553.

This group of opinions and judgments illustrates the way in which, at their best, the work of the Advocates General (individually) and of the Judges (collectively) complement each other.

The purpose of this essay is to draw attention to two passages in Advocate General Tesauro's opinion in *Brasserie du Pêcheur* where he discussed the source of the obligation of Member States to pay damages for breach of Community (now Union) law.

His argument – that the foundation of Member State liability is contractual – has always seemed to me to provide the essential link between the legal structure of EU law and conventional international law. In this essay I will suggest, first, that the contractual approach offers a way out of the sterile debate about State sovereignty («that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples»[5]) and, second, that it casts light on the current debate about the potential effect of independence movements in Scotland, Catalonia and elsewhere on membership of the European Union.

As will be seen from the wording of the opinions of the Advocates General in *Hedley Lomas* and *Brasserie du Pêcheur*, the contractual approach can be traced directly back to the reasoning of the Court in *Van Gend en Loos*[6]. A contractual approach to the Treaty had been urged by the Commission in its argument before the Court[7]. As we now know, one of the two Italian judges, Alberto Trabucchi (later Advocate General), played a leading role in altering the course of the Court's deliberations in that case.

In order to explain the background, it is necessary to refer briefly to the Court's judgment in *Francovich*[8] and to quote at some length the opinions in *Hedley Lomas* and *Brasserie du Pêcheur*.

[5] J. BRYCE, *The Nature of Sovereignty*, in *Lectures in History and Jurisprudence*, Oxford 1901, p. 504.

[6] ECJ, 5 February 1963, *Van Gend en Loos v Nederlandse Administratie der Belastingen,* Case 26/62, 1.

[7] See the summary of the Commission's argument on the substance of the first question at [1963] ECR page 7 (English text) and *Recueil 1963* page 14 (French text) where the word *contracter* is used. See also Advocate General Roemer's opinion at [1963] ECR page 20 (English text) and *Recueil 1963* page 39 (French text)

[8] ECJ, 19 November 1991, Joined Cases C-6/90 and C-9/90 *Francovich & Bonifaci v Italy*, I-5357.

2. '*Francovich*'

In 1991, in the *Francovich* judgment, the Court held that the Italian State would be liable to pay compensation for loss caused to employees by the State's failure to implement the Directive for their protection in the event of the employer's insolvency[9]. The court explained the source of the State's obligation to pay damages for breach of Community law in this way:

> 33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.
> 34. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
> 35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

The Court thus attributed the source of the State's obligation to the need to achieve the «full effectiveness» of Community law. By itself, however, this explanation is not wholly satisfactory since a treaty system may be «effective» but still be deficient in respects that render it less than «*fully* effective».

3. '*Hedley Lomas*' – *Advocate General Léger*

In his opinion in *Hedley Lomas* Advocate General Léger dealt with an argument advanced by Member States that no liability could attach to acts of the national legislature:

[9] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283, p. 23.

> 106. Refuge can no longer be taken behind the supremacy or unchallengeability of legislation: it may give rise to an action for damages if it is not in conformity with *Community law with which each Member State, upon joining the Community, undertakes to comply — and to ensure that it is complied with. By ratifying the original Treaties, the Member States limited their freedom of action in the field of Community law.* This explains why the bringing of an action for damages against the State for the legislature's failure to act is perfectly permissible where the State's liability is based on a breach of Community law, as *Francovich* shows, whereas this is hardly conceivable in domestic law …[10].
> 112. …It is not a specific organ of the State but rather the Member State *qua* State which must provide compensation.

Thus, Advocate General Léger traced the origin of State liability to the reciprocal obligations undertaken by the Member States (as distinct from the organs of the State) when they ratified the Treaties.

4. *'Brasserie du Pêcheur' – Advocate General Tesauro*

In his opinion in *Brasserie du Pêcheur*, Advocate General Tesauro continued the same line of thought as Advocate General Léger, but was more explicit as to the *contractual* foundation of state liability:

> 26. Neither does it seem to me that affirmation of the principle of State liability for breaches of Community provisions having direct effect conflicts in any way with the division of powers, as laid down by the Treaty, between Community institutions and Member States. I would merely observe in this connection that it is the infringement of Community law itself which creates an imbalance in *the division of powers freely accepted and subscribed to by the States*. Any requirement which may be imposed by Community law to make reparation for loss or damage caused by such an infringement constitutes merely a means of restoring the upset equilibrium.
> The State's responsibility for legislative activity (on the part of the legislature proper or of the administrative authorities) constitutes also from that point of view a natural and necessary part of the Community legal system created by the Treaty and by the Member States themselves. *I cannot but remind myself that it was the Member States which, completely freely, agreed the contractual rules underlying the system as a whole*; and

[10] Emphasis added.

the Member States are still the decisive protagonists in the process for the formulation of Community measures. Consequently, to hold that liability exists for failure to fulfil obligations is tantamount simply to increasing the effectiveness of the system and does not involve any activity supplementing – let alone supplanting – the legislature.

39. Certainly, I am aware that, in international law, the State's obligation to make reparation for damage arises even where in practice the compensation is aimed at restoring the financial position of individuals *vis-à-vis* one or more States and not, as is sought in the cases now before the Court, directly *vis-à-vis* individuals. *However, it does not seem possible to me to ignore the specific, peculiar features of the Community legal order. That system is based, as far as is relevant for present purposes, on a contractual foundation.* The Treaty, in common also with other agreements establishing international organizations, contains a series of obligations on Member States with regard to the achievement of the aims set out therein, which have been freely subscribed to, and to the operation of an institutional structure whose powers are very largely, but not wholly, predefined. *However, the peculiar, ultimate aim of the contractual basis in the case of the Community is integration and more specifically «lay[ing] the foundations of an ever closer union among the peoples of Europe»*[11]*, inter alia through the achievement of the common market. It follows that traditional instruments, those of international law in fact, prepared in order to promote the due, precise fulfilment of obligations on the part of the Member States have resulted and continue to result to a very great extent in giving maximum, direct relevance to the legal position of individuals. The reason for this is that the obligations of the Member States and Community institutions are directed above all, in the system which the Community system has sought and sets out to be, to the creation of rights of individuals.* This is the picture drawn by the authors of the Treaty and consolidated by the Community legislature[12].

5. *'Van Gend en Loos' – the Role of Judge Trabucchi*

In a sense, it is self-evident that the reciprocal obligations of Member States and their nationals have a contractual foundation. The Treaties are, after all, international contracts between States. But the significance of the contractual approach proposed by the Advocates

[11] Citing the Preamble to the EEC Treaty.

[12] Emphasis added.

General can be more fully appreciated in the light of what we now know about the background to the judgment of the Court of Justice in *Van Gend en Loos.* This is explored in a recent article by Morten Rasmussen[13], enhanced by the reminiscences of Paolo Gori, référendaire to Judge Trabucchi[14].

Judge Trabucchi's *note en délibéré* (now publicly accessible[15]) altered the course of the Court's deliberations and may indeed be said to said to have altered the course of history.

Gori underlines the importance to Italian civil lawyers like Trabucchi of the moral values inherent in individual rights, and explains how this was reflected in the reasoning of the Court as to the significance of Article 177 EEC (now Article 267 TFEU) in the scheme of the Treaty :

> Quant au juge Trabucchi, qui, dans sa carrière de civiliste, s'était intéressé d'avantage aux aspects concernant les droits individuels, on peut comprendre qu'il optât pour une interprétation du système constitutionnel communautaire de nature à favoriser l'élargissement du domaine des droits individuels et des possibilités de leur sauvegarde. Les voies de recours directs des particuliers devant la Cour étant limitées, ce n'était qu'en ouvrant largement aux particuliers la voie d'un accès indirect par le biais des questions préjudicielles qu'on pouvait atteindre ce but, qui allait de pair avec l'exigence d'assurer en fait l'égalité de traitement des citoyens vis-à-vis de l'application du droit commun, en se prévalant de la précieuse coopération des juges nationaux pour assurer le respect de ce droit dans les ordres juridiques internes. Or ce résultat ne pouvait être atteint que si l'on reconnaissait largement l'effet direct de ce droit, meme dans les cas où ces norms ne s'adressaient qu'aux États.

Trabucchi was, amongst other things, an expert in family law, and his adherence to the moral dimension of Community law appears very clearly in one of his last opinions as Advocate General:

[13] M. Rasmussen, *Revolutionizing European Law: a History of the Van Gend en Loos Judgment*, in *International Journal of Constitutional Law (I.CON)* Vol. 12 (2014) No 1, pp. 136-163.

[14] P. Gori, *Souvenirs d'un survivant in Van Gend en Loos 1963-2013: Conference Proceedings, Luxembourg 13 May 2013,* Publications Office of the European Union 2013, p. 29-35.

[15] The text of Judge Trabucchi's Note addressed to the other judges can be found in S. Azzalini (a cura di), *La formazione del diritto europeo: giornata di Studi per Alberto Trabucchi nel centenario della nascita,* 2008, pp. 213-223.

> The migrant worker is not regarded by Community law – nor is he by the internal legal systems – as a mere source of labour but is viewed as a human being[16].

Meanwhile, in the field of public international law, there had been a parallel development in thinking about the place of the individual in the structure of the law. In *An International Bill of the Rights of Man*, published in 1945, Hersch Lauterpacht condemned the conventional approach under which «the rights of man were given a foundation no more solid or secure than the law of the sovereign State». As he said:

> The sovereign State, in an exclusive and unprecedented ascendancy of power, became the unsurpassable barrier between man and the law of mankind. The human being became, in the offensive, but widely current terminology of the experts, a mere *object* of international law.[17]

In a letter to his wife he explained:

> The purpose of the law of nations cannot be permanently divorced from the fact that the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law[18].

So, when the Court said in *Van Gend en Loos* that the nationals of Member States are the «subjects» (rather than the «objects») of the Community's «new legal order of international law», the Court was expressly rejecting the conventional approach urged by the Member States, and asserting the new approach to international law proposed by Lauterpacht.

The essential point made in the judgment is that the rights of the individual as a «subject» of Community law are inseparable from – and are indeed an integral part of – the reciprocal contractual obligations undertaken by the Member States. This was made more explicit the following year in the Court's judgment in *Costa v ENEL,* which refers to «a legal system accepted by [the Member States] on the basis

[16] ECJ, 17 June 1975, *Mr & Mrs F v Belgium,* Case 7/75, 679 at p. 696.

[17] H. LAUTERPACHT, *An International Bill of the Rights of Man*, Oxford, 1945, republished 2013, Introduction, p. 5 (emphasis added).

[18] Letter dated 4 September 1942, quoted in E. LAUTERPACHT, *The Life of Sir Hersch Lauterpacht*, Cambridge, 2010, p. 252.

of reciprocity» as requiring the precedence of the law thus created over prior or subsequent national law[19].

The way in which Advocate General Tesauro explained the contractual foundation of EU law in the passages quoted above takes us straight back to the language and thought of *Van Gend en Loos.* It provides a legally coherent explanation as to why the fundamental principles of EU law (primacy, direct effect and State liability) are firmly based within the overall logic of the Treaties as instruments of international law.

6. *The Contractual Foundation and the Doctrine of Sovereignty*

The concern that EU law and its doctrines of primacy, direct effect and State liability are incompatible with national and parliamentary sovereignty continues to haunt the chancelleries of Europe. It led only recently to the enactment in the United Kingdom of Section 18 of the European Union Act 2011, which provides that:

> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

(This is a toned-down version of the original proposal[20] and perhaps goes no further than what had been said many years before by the English judge, Lord Bridge, in the House of Lords in the *Factortame* case[21]).

The statutory proclamation in Section 18 may offer British judges

[19] ECJ, 15 July 1974, *Costa v ENEL*, Case 6/64, 585 (page 1141 in the French *Recueil*), para 3.

[20] «*It is only by virtue of an Act of Parliament* that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom».

[21] *R v Secretary of State for Transport*, ex parte *Factortame* [1991] 1 A.C. 603 at p. 658-59, quoted by Advocate General Léger in *Hedley Lomas* (*supra,* note 5) at para 107 and footnote 122.

a solution to the perennial problem of reconciling the binding force of EU law with the doctrine of the sovereignty of Parliament. But the idea that the *locus standi* of individuals to assert their Treaty rights derives (and can only derive) from implementing legislation passed by the national parliament was precisely the approach that was argued unsuccessfully by the national governments (and in a modified form by Advocate General Roemer) in *Van Gend en Loos.*

It seems to me that the contractual approach urged by Advocates General Tesauro (explicitly) and Léger (implicitly) offers the only satisfactory legal answer to the argument about parliamentary sovereignty. The contractual obligations of the Member States *vis-à-vis* each other and their nationals, and the consequential (consensual) limitation of their freedom of action, are themselves an expression of *State sovereignty*. The rights of individuals flowing from that act of state sovereignty (and the obligations that go with them) cannot then be dependent on an act of an organ of the State (however 'sovereign' that organ may be in national law).

7. *The Contractual Foundation and the «Independence» Issue*

The issues raised by the Advocates General have acquired a new resonance in the current discussion of movements for independence in Scotland and Catalonia. On that question, the President of the European Commission, José Manuel Barroso, has said this:

> The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory[22].

Mr van Rompuy, President of the European Council has made a statement to the same effect and in almost identical words:

[22] Letter to the Chairman of the House of Lords Economic Affairs Committee of the United Kingdom Parliament – see *http://www.parliament.uk/documents/lords-committees/economicaffairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf.*

> The separation of one part of a Member State or the creation of a new State would not be neutral as regards the EU Treaties. The European Union has been established by the relevant treaties among the Member States. The treaties apply to the Member States. If a part of the territory of a Member State ceases to be a part of that state because that territory becomes a new independent state, the treaties will no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.

It is noteworthy that in both cases the Presidents refer only to the Member States and their territory. Both of them assume (which is contestable) that there would necessarily, in EU law, be a 'continuator' or 'successor' State, whose membership of the Union would continue undisturbed, while the 'separating' State would become a 'new' State *vis-à-vis* the Union. Neither of them appears to have considered the implications of Article 50 TEU (added by the Lisbon Treaty) which prescribes a period of negotiation before a Member State (and its territory) can withdraw from the Union.

Most importantly, neither of them says a word about the rights of the individuals who may be affected, far less the effect upon them as *citizens* of the Union. It can be argued that, since citizenship of the Union is a function of nationality of a Member State[23], citizenship of the Union must necessarily be lost by «transfer» of nationality to a new, independent State. But that argument begs the question whether the Barroso/van Rompuy theory is correct in the first place.

The question at issue is surely not a question of «territory» only. The territory of Member States is occupied by human beings – «nationals» or «citizens» towards whom all the Member States have, through the Treaties, incurred contractual obligations, while imposing upon them liabilities and responsibilities.

On the faith of the Treaty provisions, the people of the Union have created a complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations. These relationships, liabilities and obligations are multilateral and, in general, reciprocal. The nationals of each Member State have acquired rights of citizenship and free movement *vis-à-vis* all the others – their territory, their institutions, their economic structures and their people.

[23] Art. 20 TFEU.

They include (to take only four out of hundreds of possible examples) investors in the corporate sector, Erasmus and other students, migrant workers, and fishermen operating in the waters of other Member States.

It cannot surely be legally correct, as Barroso and van Rompuy appear to suggest, that a «separating State», its citizens and its land and sea area must – at the moment of separation or on some other unspecified date – be cast out into a legal limbo where the Treaties no longer apply. Until the moment of separation, they would remain an integral part of the EU; all EU citizens living in the separating State would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with that State. Then, at the midnight hour, all these relationships would come abruptly to an end.

The logical consequence in law would be that, from that moment, the *acquis communautaire* would no longer, as such, be part of the law of the separating State. The State would cease, for example, to be part of the Customs Union and would no longer be constrained as to the rates of corporation tax or VAT (nor indeed be bound to transfer a proportion of VAT to the coffers of Brussels). Erasmus students studying there would become «foreign students» without rights. Migrant workers would lose their rights under EU law to social security. And the whole land and sea territory of the separating State would not simply cease to be part of *territory* of the EU, but would cease to be for any purpose within the *jurisdiction* of the EU.

Notwithstanding Article 50 TEU, there would be no legal obligation upon the State concerned, the EU institutions or the other Member States to enter into any negotiations before separation took effect in order to avoid such a remarkable, and potentially uncontrollable, situation coming to pass. All the pious rhetoric about democracy, equality and solidarity with which the Member States have inflated the pages of the Treaties would be shown to be platitudinous hot air.

Two great Italians, Giuseppe Tesauro, and Alberto Trabucchi before him, have reminded us that we – States and citizens, parliaments, councils, commissions, corporations and human individuals – are bound together as part of a compact without precedent from which we derive rights and towards which we owe obligations. Whether or not the independence movements in Scotland, Catalonia or other parts of the EU are successful, it is as well to remind ourselves that *lex non cogit ad absurdum*.