

# STUDI SENESI

CXXX (III SERIE, LXVII)

FASCICOLO 1-2



UNIVERSITÀ DEGLI STUDI DI SIENA  
DIPARTIMENTO DI GIURISPRUDENZA  
2018

ISSN 0039-3010

  
**Pacini  
Giuridica**

## INDICE DEL FASCICOLO

### MEMORIE

S. AMATO, Sulle recezione dell' <i>Esprit des lois</i> nella Prussia federiciana: il "Vom Tode für das Vaterland" (1761) di Thomas Abbt .....	pag. 7
V. AZIMI, Notations historique autour du "Code des relations entre le public et l'administration" .....	» 26
S. CARMIGNANI, Politiche energetiche europee e impresa agricola.....	» 48
M. VITIELLO, Legalizing marijuana: lessons from the United States ....	» 59

### ATTI DEL CONVEGNO INTERNAZIONALE "GUIDO TEDESCHI BETWEEN ITALY AND ISRAEL"

*Siena – Milano, 10-12 luglio 2017*

M. PERINI, Introduzione .....	» 95
F. COLAO, Note su Guido Gad Tedeschi, giurista ebreo del novecento .	» 101
G. SHALEV, Private law codification: the israeli experience .....	» 126
E. ZAMIR – D. TEICHMAN, Consumer contracts: a behavioral perspective	» 133
S. PAGLIANTINI, La civilistica senese tra leggi razziali e scuola napoletana	» 189
I. ENGLARD, Guido (Gad) Tedeschi on the judicial process .....	» 201
R. GUERRINI, The cooperation agreement between the faculties of law of Siena and Jerusalem: partnership experiences .....	» 209
B. GARDELLA TEDESCHI, Da Israele all'Italia: le opere di Guido Tedeschi in Italia dopo l'alià .....	» 217
P. LERNER, Leaving home, transplanting law: Guido Tedeschi and other jewish émigrés from Europe .....	» 229
Y. ADAR, A glance at the work of a legal artist. Tribute to the grand master of Israeli legal academia .....	» 252
Elenco pubblicazioni di Guido (Gad) Tedeschi (1929-1983) .....	» 269

### RASSEGNE DOCUMENTI DISCUSSIONI

R. GUERRINI, Report on Criminal Liability of Corporations in Italy ...	» 274
--	-------

### RECENSIONI

<i>Statuto del comune di Foiano del 1387</i> (P. NARDI) .....	» 296
<i>Oltreoceano: politica e comunicazione tra Italia e Stati Uniti nel Novecento</i> (L. SENESI) .....	» 299

## A GLANCE AT THE WORK OF A LEGAL ARTIST TRIBUTE TO THE GRAND MASTER OF ISRAELI LEGAL ACADEMIA

SUMMARY: 1. Prologue. – 2. Tedeschi's Concept of Contract. – 3. Tedeschi's Concept of Tort. – 4. Characteristics of Tedeschi's Composition. – 5. Epilogue

### 1. *Prologue*

Regrettably, not every Israeli lawyer in our day will recognize the name of the founder of the Israeli legal academia. However, the thousands of lawyers, scholars and students of law courageous enough to have read even one legal article of the great master of civil law, will forever utter the name “Tedeschi” with awe.

As a first year law student, I first passed through the doors of the Hebrew University of Jerusalem by the end of October 1992. Less than a month later, at the age of 85, the grand master of the Israeli legal academia passed away. Hence, unlike my admired teachers of civil law – his devoted pupils – I had forever lost the opportunity to sit in Tedeschi's class, to hear him lecture, or to meet him in person.

However, the grand master of our civil law had not left without leaving us an inheritance. Quite amazingly, at a relatively advanced stage in his life, Tedeschi had come to master the Hebrew language, which was not his native tongue. This extraordinary achievement enabled him to leave behind – apart from the countless legal articles he had contributed to the Italian legal heritage – an incredible treasure: 116 articles, and 22 edited books, both in Hebrew and in English<sup>1</sup>.

I dare venture that none of Tedeschi's disciples has managed to read all, or even most, of his scholarship. This is due not only to its massive magnitude. Two other obstacles face anyone attempting to benefit from the work of the great Tedeschi: First, unlike the works of most contemporary legal scholars, Tedeschi's scholarship covers an extremely wide range of

<sup>1</sup> A full list of Tedeschi's publications in Hebrew, English and Italian can be found in the appendix to a short volume his pupils dedicated to his memory: G. SHALEV, A. BARAK, M.A. RABELLO, (eds.), Jerusalem 1992. It is replicated *infra*, p. 269.

topics. His research has reached every corner of civil law, many areas of commercial law, as well as the more general domains of legal philosophy and jurisprudence: Contracts, torts, property, unjust enrichment, inheritance, agency, banking, legal Capacity, family law, trusts, consumer protection and many more areas of law, were subject to his close scrutiny on a regular basis. In addition, Tedeschi dedicated much of his work to the fundamental problems concerning the shape and design of the emerging Israeli system: Legislation, codification, judicial discretion, legal interpretation, precedent, custom and the role of tradition and religion, as well as that of comparative law.

Secondly, and probably more significantly, to read an article of the great master is never an easy task. Far from resembling a relaxed walk along the lake, it is more like a steep ascent towards a peak covered with ice, through slippery pathways and past ominous cliffs. It demands much from the pupil who aspires to join his Guido (guide) in a journey to the mountain crest: Thorough preparation is mandatory, will power required, resilience and patience demanded. Indeed, oftentimes will the student find himself exhausted from the effort to keep pace with the teacher. He must then halt to rest, regain his force, and resume the trek, hoping to catch up, at some further point, with his tour guide.

The reward of the assiduous follower is, however, guaranteed. From the top of the crest a whole new landscape will have revealed to him: More complex but at the same time clearer; awesome but more accessible and less menacing; familiar, and yet much more beautiful than ever before.

As a pupil and later on a colleague of Tedeschi's closest disciples, I view myself as his intellectual grandson (or great-grandson). Like my natural grandfather, Yehuda, of whom I have only heard stories and been shown pictures, Tedeschi speaks to me through my teachers' tales and past the texts he had composed.

In this short essay, which I dedicate to his memory, I try to identify and formulate some of the unique characteristics of Tedeschi's scholarship. I will attempt to do this by taking a glimpse at two seminal articles, in which he strived to re-examine – and reformulate – the constitutive elements of two fundamental concepts of private law: The concept of a “contract”, and that of a “tort”.<sup>2</sup> In the two following parts of this essay I briefly summarize the

<sup>2</sup> See, respectively: G. TEDESCHI, *Some Aspects of the Concept of Contract*, in 1 “Isr. L. Rev.”, 1966, p. 223; Id., *On the Concept of Tort*, in 3 “Isr. L. Rev.”, 1968, p. 161. Both

main contributions of each of these two masterpieces. I then outline what I view as some unique features of the great master's composition, as they are revealed in these two magnificent pieces of scholarship.

## 2. *Tedeschi's Concept of Contract*

In this article, which was published in the first volume of the *Israel Law Review*, Tedeschi revisited a long-debated question: What is a contract?

The first chapter revisits the longstanding intellectual controversy between the "contract as promise" school on the one hand and the "contract as agreement" school on the other hand. In this context, Tedeschi criticizes a trend he identifies in Anglo-American legal literature, which regards the existence of a promise not merely as a necessary but also as a sufficient condition for establishing contractual responsibility<sup>3</sup>. Unlike the traditional view of both the civil and the common law, scholars adhering to this modern view "prefer to define contract solely in terms of promise and sometimes even go so far as to reject agreement as an element of contract"<sup>4</sup>.

The argument supporting the "new theory", Tedeschi explains, highlights the centrality of the objective theory within the common law of contract formation. If a contract does not require a true "meeting of the minds", but merely an external manifestation of a will to be bound (i.e., a promise), then the element of "agreement" or "consent" becomes secondary or even redundant to the definition of contract. Contrary to the traditional continental approach, what is required under the English common law of contract, so goes the argument, is not a subjective common will but rather an objective promise coupled with consideration.

Rejecting this argument, Tedeschi explains that there is no logical link between the two issues, namely the choice between an objective and a subjective theory of formation on the one hand, and the choice between promise and agreement as the constitutive elements of contract, on the other hand. Indeed, just as the concept of agreement is susceptible to different interpretations (e.g., subjective or objective meeting of wills), so is the concept of "promise". Both approaches are applicable to both concepts. Thus, the justifications for the objective theory do not dissolve in moving from "prom-

articles are written in English, and are electronically accessible via legal databases such as HeinOnline, LexisNexis, etc.

<sup>3</sup> Tedeschi lists the relevant sources *Id.*, at p. 223, footnote 1.

<sup>4</sup> *Id.*, at p. 224.

ise” to “agreement”. Similarly, the justifications for the subjective theory can support a subjective promissory theory inasmuch as they can support a subjective theory of “agreement”. In Tedeschi’s own words:

The fact that in English law – more than in other systems – the wills of the parties may diverge without affecting the existence of the transaction as a contract may cause some difficulty, but the idea that this difficulty may be resolved by the substitution of “promise” for “agreement” is to be regarded as no more than illusory. ... both according to the “agreement” and “promise” theories, the objective and subjective points of view are equally tenable for the very same reasons and with the same degree of persuasive force<sup>5</sup>.

Indeed, Tedeschi clarifies, even proponents of the promissory theory of contract have admitted, if only tacitly, that a contract requires not merely a promise but also consent. This is evident from the undisputed doctrine that requires both an “offer” and an “acceptance” for the formation of a contract. Furthermore, while an executory contract will necessarily include a promissory element, such an element is clearly absent from other types of enforceable agreements, such as conveyances transferring real rights. If such agreements are to be considered contracts at all, it is only because they reflect the consent of the parties rather than a promissory obligation of either of them.

It is true, he adds, that the element of consent, while essential to the concept of contract, is by no means a sufficient condition for the formation of a legally valid contract. It is also true that a classic or “simple” contract, that is, an agreement containing contractual obligations, will usually incorporate a promise of (at least) one party made to the other. However, even this is not entirely accurate, given that certain contractual obligations are not promises in the ordinary sense (i.e., an undertaking to take a certain course of action in the future) but rather warranties, namely declarations or statements implying some kind of responsibility with respect to a certain present or future state of affairs<sup>6</sup>.

To conclude, while “agreement” should not to be equated with “contract”, this concept, Tedeschi maintains, is a necessary element of every contract and as such a vital element in any theory of contract law.

<sup>5</sup> *Id.*, at pp. 224, 225.

<sup>6</sup> *Id.*, at p. 227.

Having clarified the relevance of consent to any contract theory, Tedeschi moves forward, in the next chapter, to refine this concept and its relation to the concept of contract. He starts with an illuminating analytical distinction between the social practice of agreeing and the concept of agreement in a more restricted and formal (though not necessarily legal) sense. Whereas in ordinary everyday language two persons can agree on almost anything (e.g., on what the weather is, on certain political views, etc.), this will not always suffice to form an “agreement”. For example, judges or members of parliament can agree on the desirability of a certain legal outcome (judicial or legislative) but this does not make them parties to any “agreement”. The forming of an agreement *strictu sensu* requires, Tedeschi argues, more than just being “in agreement”: It requires a *reciprocal expression of will (of all agreeing parties) to bring about a change in the legal position* – of either themselves or a third party.

Within this narrower idea of agreement, Tedeschi offers yet another distinction between an agreed legal change that does not affect the parties’ rights as against each other, and such that concerns their respective rights and duties. For example, an agreement between heirs regarding the allocation of the inherited assets of an estate may not affect their respective rights and duties *vis a vis* each other. While such an agreement may be enforceable, it will not necessarily amount to a contract. The same is true for an agreement whereby a guardian affirms a previous legal transaction undertaken by a minor under her custody. If an agreement is to be considered a contract, it must reflect *the parties will to change their legal position viz a viz each other*. Such desired change, in turn, can be of at least two types: First, the parties can agree on the immediate transfer of a right (real or personal), to be concluded on the moment of agreement (e.g. through a conveyance). In this case the agreement brings about a change in the parties respective legal positions, but does not necessarily create an obligation of any of them towards the other. While such an agreement may be called a “contract”, it is very different from the classic obligatory (or promissory) contract. In the latter, type of agreement which Tedeschi suggests naming “the simple contract”, *the desired legal change is reflected in the creation of a new obligation of at least one of the parties toward the other* and, as a result, a new correlative right *in personam* of the latter towards the former.

Hence, the concept of contract, while based on consent, includes a number of additional elements which distinguish it from other similar social and legal phenomenon. Indeed, Tedeschi emphasizes, this is exactly the point of any intellectual process intended to enhance our understanding of a given

phenomenon. To be productive, the focus of such an effort should not be on distinguishing the concept under discussion from concepts remote from it. Rather, he explains:

When endeavouring to characterize a certain concept it is best to concentrate on those things which are *closest to it* and to go on to distinguish it from them<sup>7</sup>.

As if these definitional clarifications were not a sufficient contribution, Tedeschi moves on to offer yet another analytical distinction. Based on the German concept of *vereinbarum*, he engages in a detailed analytical scrutiny of a possible theoretical distinction between two types of contracts: Ordinary exchange, where the parties occupy contrasting economic positions, and agreements motivated by a purpose common to all parties (the *vereinbarum* model of agreement)<sup>8</sup>.

Tedeschi then moves on to eschew a common metaphor depicting all contracts as the outcome of a common will and common interest of the parties thereto. In fact, he explains, in most contracts the wills, purposes and interests of the parties are not only different but even opposing. To illustrate, in a typical sales agreement, the seller is motivated by the will to receive the promised price, whereas the buyer's motivation is to receive title. True, both parties wish to cooperate because such cooperation is required, under the law of contract, if they are to fulfill their respective expectations from performance. However, their true (subjective) motives are different and in fact opposing. In this sense, Tedeschi observes, a contract resembles a peace treaty, where rival parties seek a way to settle a pre-existing conflict of interests<sup>9</sup>.

However, in contrast to the typical exchange contract, some contracts are indeed motivated by a common will. That common will unites the parties around a common goal, common interest and often common declarations and obligations as well. This had led some continental scholars to conclude that such agreements (e.g., a company's memorandum of association, partnership agreements, and even marriage agreements) should not be considered contracts at all.

While recognizing the important analytical difference between the two

<sup>7</sup> *Id.*, at p. 231 [emphasis not in original].

<sup>8</sup> The discussion is to be found at pp. 232-242.

<sup>9</sup> *Id.*, at pp. 231-231.



phenomena, Tedeschi points out that even in agreements of the later kind the specific interests of the parties are not always identical and, in fact, are in many cases contradictory (as each party strives to maximize its privileges and minimize its commitments under the agreement). Nonetheless, Tedeschi recognizes the significant structural differences between the two types of agreements, which in turn may have an impact on the substantive norms governing the two types of transaction (in particular, more cooperative norms should be expected to govern the *vereinbarum* contract). Therefore, he concludes, whether or not the term “contract” should apply to both kinds of agreement, this structural difference is analytically illuminating and should be kept in mind when designing the substantive rules applying to contracts falling within each of these two theoretically distinct paradigms<sup>10</sup>.

The third and closing part of the article introduces the reader to another civilian distinction, namely that between the “concrete” or empirical aspects of contracts (or legal transactions more generally) and their “normative” aspects. Whereas the former define the concrete actions (or omissions) that each party may (or may not) be required to perform under certain specified conditions, those falling in the latter category (e.g. collective employment agreements and some standard form contracts) regulate in a more general and abstract manner the legal regime that is to govern the parties’ (or third parties’) rights and duties at future stages in the life of the contract. While any contract may potentially include both a concrete and a normative dimension, “normative contracts” resemble more strongly acts of private legislation. As such, whether or not they should be considered analytically distinguishable from the general category of “contracts”, agreements of this sort demand different treatment and, at least for methodic purposes, deserve a different label<sup>11</sup>.

If one is to summarize the main contributions of “The Concept of Contract”, I would dare offer the following proposition: In defining the phenomenon of a contract, promise and agreement should not be set against one another as competing concepts. Rather, they should be regarded as complementary concepts, each playing a crucial role. Furthermore, a contract, properly understood, must include, at a minimum, four elements which further distinguish it from both a “promise” and an “agreement” in the loose sense:

<sup>10</sup> *Id.*, at pp. 241-242.

<sup>11</sup> The full discussion of “Normative Agreements” is to be found *Id.*, at pp. 242-249.

- 1) *Consent*: The agreement must reflect the consent of two (or more) parties.
- 2) *Common Will to Change Legal Situation*: The consent of the parties must express their common will to bring about a certain change in the pre-existing legal position of at least one of the parties or that of a third party<sup>12</sup>.
- 3) *Impact on Parties' Respective Rights and Duties*: The desired change in legal position must affect the respective legal rights and duties of the parties *vis a vis* each other (and not merely the rights of third parties).
- 4) *Creation of a Promissory Obligation*: Fourth, the desired change in the parties' respective legal positions must manifest itself in a promise. The promise creates a new obligation (and thus a correlative right *in personam*) of (at least) one of the parties towards the other.

To conclude, under Tedeschi's view, as I understand it, a contract is an enforceable agreement, reflecting the common will of the parties thereto to give legal effect to a promise made by (at least) one party to the other.

### 3. *Tedeschi's Concept of Tort*

A few years after the publication of the "Concept of Contract", Tedeschi engaged in an inquiry into the concept of tort<sup>13</sup>. The article opens with a *caveat*: Given that many able tort experts have doubted the usefulness and necessity of such inquiry, one may hesitate to engage in what might seem a useless attempt to define the indefinable.

All the same, Tedeschi immediately proceeds to reject this skeptical approach. For although, under the common law, every tort may contain different elements, "there can be no doubt of the existence of a normative order, of legal rules common to different torts"<sup>14</sup>.

Hence, at the very beginning of the discussion, Tedeschi highlights a fundamental distinction between the factual or *empirical elements* of a legal concept, and its *normative elements*. Whereas the former define the factual situations which will give rise to the concept, the later define the legal impact or outcome attached by the law to that concept. Tedeschi here teaches us an important general lesson: When looking to define any legal phenomenon, one

<sup>12</sup> In continental or civilian terms, a contract is, first of all, a "legal act" or a "legal transaction".

<sup>13</sup> G. TEDESCHI, *On the Concept of Tort*, in 3 "Isr. L. Rev.", 1968, p. 161.

<sup>14</sup> *Id.*, at p. 162.

must pay attention both to its factual and to its normative (or legal) elements.

Thus, he explains, in the present context, a full analytical inquiry into the definition of tort or of tort law must answer both the factual question, namely what, if at all, are the common elements of every tort? and the normative question, namely what are the legal outcomes attached to the commission of every tort?<sup>15</sup>.

Faithful to this fundamental theoretical distinction, Tedeschi then moves on to examine, as a first step, whether it is possible to suggest a factual core common to all torts. While the usefulness of such examination cannot, for Tedeschi, be doubted, he admits that such an inquiry can, in theory, result in any of the following conclusions: First, all torts share a common denominator of factual elements which are both essential and sufficient for establishing tort liability; Second, all torts share a common denominator of factual elements essential to – but not sufficient for – establishing tort liability; Third, there is no common denominator shared by all torts. Thus, under this last view, the factual province of the law of tort is simply undefinable<sup>16</sup>.

Among these three approaches, Tedeschi adheres to the second, interim position: There is indeed a common denominator to all torts, which is the element of *injuria* or *wrongdoing*, namely conduct in violation of another person's right. Unfortunately, however, notwithstanding the remarkable efforts of great writers (such as Winfield, in his "Province of the Law of Torts") the more ambitious (first) approach cannot be upheld: Apart from *injuria*, there seems to be no single empirical element common to all torts<sup>17</sup>.

Thus, Winfield's proposition that all torts represent violations of rights *in rem* (or, which is the equivalent, duties directed "toward persons generally") is found untenable, given that certain torts can arise from the violation of rights *in personam* (as under the torts of negligence, breach of statutory duty and deceit). On the other hand, the claim that all torts arise from the violation of duties "primarily fixed by law" is also rejected, this time on the ground that such an element cannot distinguish a tort from any other violation (e.g., of contractual rights or even rights under public law)<sup>18</sup>.

Tedeschi's regrettable, though inevitable conclusion is that: "we cannot discern a single *positive* element, added to *injuria*, characterizing generally

<sup>15</sup> *Id.*, at p. 161.

<sup>16</sup> *Id.*, at p. 162.

<sup>17</sup> *Id.*, at p. 164.

<sup>18</sup> *Id.*, at pp. 164-167.

the province of tort<sup>19</sup>.

Having addressed the question of the province of the law of torts, Tedeschi moves on to examine the possible common features of the *normative order* governing torts. To begin, he examines the widely accepted proposition that a tort will always give rise to an *action* for unliquidated damages. Tedeschi criticizes this formulation for its focus on the procedural rather than on the substantive aspect of the right to damages.

He then dedicates a number of paragraphs to examine possible differences between the English common law and the statutory Israeli law of torts. He concludes that, regardless of those differences, both systems recognize a general right to compensation for all torts. Furthermore, unlike some writers who had denied the existence of a substantive right to damages prior to judgement, Tedeschi took the view that a substantive right to compensatory damages arises *immediately* upon the commission of the tort<sup>20</sup>.

This, however, does not mean that damages will be awarded for any tort. Indeed, the right depends on the proof of actual loss to the plaintiff as well as other elements such as factual and legal causation. In Tedeschi's words:

The law lays down a right to damages in every case where there is tort, but clearly only when damage is suffered; and only, it should be added, when damage occurs which the law considers compensatable within the scope of the particular tort<sup>21</sup>.

This feature of torts, Tedeschi stresses, highlights another feature, namely, the non-discretionary nature of tort damages. Unlike other contexts where compensation may be available (e.g., under criminal law or the law of equity), tort damages are awarded to the injured plaintiff as a matter of right, not as a matter of judicial discretion<sup>22</sup>.

Next, the master of civil law proceeds to suggest yet another original feature by which he offers to distinguish torts from other instances where a violation of a right entails the right to compensatory damages (e.g., breach of contract). As it appears, the true analytical difference between damages in tort and damages for breach of contract lies in the distinct nature of the

<sup>19</sup> *Id.*, at pp. 166.

<sup>20</sup> *Id.*, at pp. 168-169.

<sup>21</sup> *Id.*, at pp. 170.

<sup>22</sup> *Id.*, at pp. 171-172.

former right as a *new right*, as opposed to a *pre-existing right* preceding the violation.

Thus, whereas the right to damages for breach of contract can more easily be seen as a logical extension or corollary of the primary contractual right (to performance of the obligation), the right to damages for a tort is substantively different – in both essence and scope – from the primary right (either *in rem* or *in personam*) the tort infringed:

The relation between the right created by contract and one arising from a breach of contract appears to be more intimate than the relation between a right infringed by a tort and the right arising from the tort. The remedial contractual right is considered by law as an extension of the contractual right infringed, as a modification of the original right, but a right derived from a tort is considered a new right as compared with the primary right infringed. ... [T]he tortious liability naturally presents itself as a novel relationship compared with the original relationship which existed... between tortfeasor and injured party. ... If this is the case, the right to damages in tort differs materially from that in contract<sup>23</sup>.

Subsequently, Tedeschi discusses the common proposition that tort damages, unlike contract damages, are unliquidated rather than liquidated. Rejecting it, Tedeschi explains why, in principle, as well as in practice, damages for a tort can be restricted or liquidated – either by statute or by the parties – just as contract damages<sup>24</sup>.

Finally, Tedeschi examines the possibility to add to the characteristics of the legal order applying to torts the notion that a tort entails a secondary right to an injunction. Tedeschi finds the injunction, especially the preventive injunction, analytically distinct from the right to damages.

First, at least under English law, it is considered more of a discretionary remedy, to which the injured party is not entitled as of right. Second, and more importantly, unlike damages, the preventive injunction has no reparatory or curative effect with respect to a tort already committed. Therefore, from an analytical perspective, it should not be considered a remedy at all. Nonetheless, injunctive relief is an important prophylactic measure against future torts. As such, it should be considered an important feature of

<sup>23</sup> *Id.*, at pp. 173-174.

<sup>24</sup> *Id.*, at pp. 175-177.

the legal order applying to all torts<sup>25</sup>.

The great master then concludes the article, not before paying tribute to the same writers and scholars which he himself has just criticized. Moreover, he submits, the main purpose of his analysis had not been to replace common problematic definitions of tort law with new ones.

Nonetheless, given that some definition of tort must be ultimately adopted by anyone dealing with the subject, Tedeschi, with half a smile, offers the “patient reader” of this marvelous article, whose possible expectation he “would not want to disappoint”, the following proposed definition. He so writes:

And if, *in fine*, a definition be required relating to both the constituent facts and the normative order, let us state shortly that a tort is a civil wrong subject to particular rules which include preventive and remedial measures, among them the right to damages which is a new right in relation to that infringed by the tort<sup>26</sup>.

#### 4. *Characteristics of Tedeschi's Composition*

My effort to summarize the main insights of the two articles discussed above was intended to give the reader – especially the one unacquainted with Tedeschi's work – a sense of the typical questions which attracted his attention, and the unique method through which he approached them.

Although barely a drop in the sea of his colossal academic produce, I believe that these two examples are to a certain (naturally, limited) extent representative of his scholarly work more generally. In the following lines I shall try to formulate what I perceive as the unique characteristics of Guido Tedeschi's scholarship, as mirrored in the “Concept of Contract”, “the Concept of Tort”, and other compositions of this great legal scholar.

*Self-Confidence.* A first remarkable feature concerns Tedeschi's extreme self-confidence in his own intellectual capacities. Tedeschi did not hesitate to put on the table any legal topic and to dissect it anew. Notwithstanding his being a civil law expert, he undertook not only concrete doctrinal investigations (to which he devoted a large part of his scholarly work) but – as these two articles illustrate – more abstract and conceptual issues as well. While touching upon such general topics, he did not avoid facing fun-

<sup>25</sup> The discussion is to be found *id.*, at pp. 177-182.

<sup>26</sup> *Id.*, at p. 183.

damental legal and philosophical questions, which the greatest scholars of his generation (and past generations) have thoroughly addressed. Williston, Corbin, Terry, Cook, Paton, Pollok, Winfield, Holmes and Pound, as well as the giants of the civilian continental tradition, on whose knees he had been raised – were all called to order. Indeed, while always treating these giants with respect, Guido felt completely free to revisit their positions, propositions and presumptions and – where he found their analysis lacking – free to firmly criticize it.

*Analytical Rigor.* The diversity of topics and sources with which Tedeschi chose to engage make any attempt to classify his method of research presumptuous. However, it is beyond doubt that a salient feature of his work is its inclination towards meticulous analysis of legal concepts and doctrines (principles, rules, etc.). In so doing, Tedeschi remained loyal to the intellectual school which takes law and legal doctrine seriously.

Within this school, he takes a prominent position as one of the greatest “legal analysts” of our time. As almost any paragraph in his “analytical articles reveals”, Tedeschi’s ability to “dissect” – breakdown, isolate, define and compare legal concepts – is, at least in the context of Israeli legal scholarship, unprecedented and unmatched by any other legal scholar.

*Tedeschi the Mediator.* It is important to note that Tedeschi’s loyalty to the close scrutiny of legal concepts was not driven only by his aspiration to reach completeness in legal research (though such aspiration is clearly evident). I believe that his goal was much wider: He strived, through this method of analysis, to make the building-blocks of which legal doctrine, legal discourse and legal science are made more accessible to those wishing to use them.

Indeed, unlike empirical facts, legal norms and concepts necessarily contain intangible aspects and to an extent are always abstract or general. As such, applying legal norms to real life situations often requires complex processes of interpretation, as well as recourse to meaning which does not always conform to the intuitive or linguistic meaning of the concept under discussion. One of Tedeschi’s primary goals, it is submitted, was to try and narrow this inherent gap by facilitating access to the law.

His analysis aims to reduce, to the minimum possible, the vagueness and ambiguity inherent in the language of the law. In doing so, Tedeschi acted, in fact, as *a mediator between the law and its professional agents*: Judges, lawyers, and scholars. These actors, whose social function is to communicate the law to its subjects, are themselves in need of a mediator: One that will enable them to better understand the complex legal reality which they

are supposed to convey to litigants, clients, students, and the public at large.

That mediator, so believed Tedeschi, is the highly trained legal scholar. Indeed, this is the one promised reward that any of Tedeschi's faithful readers can be sure to obtain. If the effort to follow the Master's path to its end is successful, the student will have acquired, by the end of the journey, a brighter picture of the relevant legal scenery. He or she will be able to better comprehend the complexity of legal doctrine: To recognize its stable elements, and at the same time to identify the more flexible and dynamic elements, as they interact with the former ones.

However, for Tedeschi, I believe, rigorous legal analysis was more than just an (admittedly satisfying) intellectual exercise: By making the law more accessible and comprehensible, Tedeschi's work allows us, the law's agents, to become more closely attached to the law, more familiar with its intricacies, strengths and weaknesses, and more capable of applying it rationally to empirical facts and to human conduct.

Thus, if only implicitly and indirectly, Tedeschi's writings teach us a valuable lesson: Any attempt to reform the law to the benefit of society must begin with a deep understanding of the complexity of legal doctrine.

*Modest Originality.* This is another feature of Tedeschi's writing. Notwithstanding his self-confidence, his style is not arrogant and does not convey a sense of self-importance. This kind of modesty is reflected in the names chosen for his essays and articles. In contrast to a familiar contemporary trend, he had consistently resisted the temptation to adopt pompous titles to his compositions. Neither did his articles purport, as modern pieces of scholarship so often do, to present a grandiose theory or to propose a strikingly original line of argumentation. His primary aim was rarely, if ever, to attack perceived "conventional wisdoms" or "to invent the wheel" anew. Rather, as the two articles discussed above demonstrate, he preferred to look at his own work as adding a modest, incremental contribution to a certain area of legal science which, as it seemed to him, could benefit from a fresh analytical reexamination.

Notwithstanding, there is no legal topic he had explored without leaving original footmarks<sup>27</sup>. In his typical modest way, he would proceed painlessly through the thick maze of concepts, rules and ideas pertinent to the legal

<sup>27</sup> See, e.g., his proposed definition of a tort (cited *infra*, text to fn. 25) wherein he planted two additional elements, namely the unique character of the right to tort damages and the preventive dimension of tort remedies.



issue at hand. Along the path, step by step, the master would guide the steadfast reader through the forest of legal doctrine and jurisprudence, generously spreading original insights, penetrating observations and sharp critique. Finally, almost as silent as he had entered it, he would leave the legal terrain he carefully cultivated and plowed with the utmost care and devotion.

Then again, and to me somewhat surprisingly, in spite of his keenness to conceptual analysis and formal reasoning, Tedeschi was usually cautious not to overstate the truth of his own conclusions, reminding himself – and his readers – that while clear thinking and clean language are essential, absolute definitions are rarely attainable in legal science. Indeed, when concluding his “Concept of Tort” article with a proposed definition, he nonetheless felt the need to stress that the “harvest” of legal scholars who have sought to define basic legal concepts “is only partially reflected in the definitions they have elaborated”<sup>28</sup>.

As we have seen, the same prudential attitude is reflected in his analysis of the “Concept of Contract”. While pointing out what he regarded as valuable conceptual components of the paradigmatic contract, he avoided attaching any sanctity to his classifications, openly admitting that some of the most revealing distinctions he had himself urged to take into account may be difficult to implement in practice<sup>29</sup>.

Indeed, if Tedeschi’s had any presumption, it was not that of exposing an absolute truism that escaped the eyes of all others. Rather, his modest goal was to enhance – with the assistance of clean terminology and careful analysis – his readers’ capacity to grasp the complexity of the law, without losing sight of its more stable elements.

*High Demands from Writers and Readers.* Tedeschi regarded legal analysis as a scientific process. As such, he approached it with the utmost seriousness. For Tedeschi, anyone purporting to engage scientifically in legal analysis must be held to the highest standards of rational thinking to which he held himself: Thorough preparatory research, clear and consistent thinking, and precision of language. Anything less would not be acceptable.

Indeed, when confronted with analysis which he had found below the minimum expected standard, he did not refrain from sharing his reproach with the reader. Thus, in his “Concept of Tort” article, scorning the loose

<sup>28</sup> *Id.*, at p. 182.

<sup>29</sup> The clearest example being his treatment of *vereinbarum* agreements and of “normative agreements”.

usage of the term “tort duty” to express the primary duty which a tort infringes, he mentions the need “to eschew here imprecision of language, such as unfortunately occurs frequently even with the best of writers”<sup>30</sup>. Similarly, at a later point in the discussion, the master feels the urgency to warn his readers once again against such “glaring examples of loose thinking”<sup>31</sup>.

Different, but still very demanding, was the great master’s approach to his readers. Tedeschi’s style of writing is by no means what we might describe today as “user friendly”. To begin, his texts were rarely addressed to “beginners” unacquainted with the field in question.

Secondly, his uncompromising aspiration for precision and completeness of description had often resulted in lengthy and complex sentences (but always grammatically sound!), which the average reader could have found difficult to digest. Finally, his casual reference to comparative law, ancient law and philosophical jargon, together with the wide variety of associations and analogies to which he would often resort in order to illustrate an idea, had also contributed to the density of his texts. All this could have the effect of leaving even the most eager learner fairly exhausted halfway into the composition, if not earlier.

## 5. *Epilogue*

This essay represents my best efforts to elucidate what I, a junior (or so I feel, in this context) Israeli private law scholar, regard as characteristic of the scholarship of the late professor Gad (Guido) Tedeschi.

As an epilogue, nothing seems more appropriate than to cite a few words of the grand master himself. Towards the end of his masterpiece on “the Concept of Tort” he recalls the lesson to be learnt from an old tale:

La Fontaine relates the fable of the peasant who, on his death-bed, disclosed to his children the existence of a treasure in the field he left them. The children, by digging and turning the earth in their search for the non-existent hoard, found at length the real treasure in the increased fertility of the land. A number of scholars have attempted to define torts in English law and in so doing have undeniably made important contributions to conceptual clarification in this area. Their “harvest” is only partially reflected in the definitions which they have elaborated.

<sup>30</sup> *Id.*, at pp. 162-163.

<sup>31</sup> *Id.*, at p. 165.

Much of Tedeschi's idea of the art of legal research, it seems to me, is encapsulated in this short paragraph. Indeed, if one is to pick a single metaphor to capture the legacy of the great Tedeschi, that of the sage farmer in La Fontaine's fable seems the most appropriate. The study of law, we are reminded here, is a long-term arduous task, the harvest of which is guaranteed only to the patient, hard-working learner.

This truth, I submit, is proven by the astounding academic achievements of the great master of the Israeli legal academia. Indeed, the harvest reaped by Gad (Guido) Tedeschi, the legal artist, the "farmer", teacher, mentor and scholar seems to me far greater than any scholar of our time could ever expect. It is now for us, the farmer's children, each in her or his own way, to treasure the wisdom of past generations and continue plowing the legal soil – that "promised land" that our great intellectual father nurtured and cherished until his last day.

YEHUDA ADAR\*

\* Yehuda Adar is a Senior Lecturer in Private Law, University of Haifa, Faculty of Law. Email: yadar@law.haifa.ac.il. This essay is based on a lecture delivered at the University of Bocconi, July 12, 2017, at a conference dedicated to Guido Tedeschi's contributions to Israeli and Italian law. This is a modest tribute to his memory.