

Der Prozess als Rechtslage – James Goldschmidt 1925

Proceedings as a sequence of judicial situations

- A critique of the procedural doctrine –

I. Why this book?

This book of James Goldschmidt is widely considered a classic monograph on German procedural law. Sometimes it is quoted as the latest book based on doctrinal thinking of the late 19th and early 20th century.¹ This procedural doctrine started with *Oskar Bülow* in 1868 when he published “Processeinreden and Prozessvoraussetzungen” distinguishing the admissibility and the merits of lawsuits and procedural law from substance. In 1879, the “*Zeitschrift für den Zivilprozess*” was established; it was in the same year that the CPO entered into force.² The so-called “neue Prozessrechtswissenschaft”³ (*Bülow*) was marked by an approach which searched for a logical terminology. This terminology was partly found in the codification itself, but was also presupposed as a self-standing system of procedural law in general. Methodologically, the procedural doctrine of this time borrowed largely from private law (especially from the “*Pandektistik*” with regard to terminology and legal constructions) and, therefore, from Roman law. However, the objective procedural science was to develop a genuine procedural terminology and a self-standing procedural system of its own. At the same time, the commentaries of the Code of Civil Procedure profited from the terminology and system of the legal doctrine, but they equally prohibited the legal doctrine from deviating too far from the positive text of the CPO which was increasingly considered the main object of legal research and reasoning.

II. Major achievements of Goldschmidt’s Rechtslage

Goldschmidt’s *Prozess als Rechtslage* must be explained against the methodological background of his time. The objective of the author was to understand and to explain civil and criminal proceedings from a purely procedural

¹ *Bruns*, James Goldschmidt (17.12.1874 – 18.6.1940), ZJP 88 (1975), 121 („letzte große Leistung der deutschen konstruktiven Prozessrechtswissenschaft“).

² *Hess*, Carl Josef Mittermaier, *Zivilprozessrecht in Europa vom 19. Jahrhundert bis in die Gegenwart*, in: *Baldus/Kronke/Mager*, *Heidelberger Thesen zu Recht und Gerechtigkeit* (2013), p. 143, 155 et seq.

³ The new science of procedural law.

perspective. The book contains a systematic theory aimed at explaining the “nature” of procedural law. The monograph comprises 580 pages, and it is divided into two major parts:

In the first part, Goldschmidt attacks the predominant legal doctrine which explained the process as a legal relationship between the parties and the court. This relationship was denominated “Prozessrechtsverhältnis” (procedural relationship) – similar to a kind of contractual relationship in civil law, but based on public law.⁴ The procedural relationship existed between the parties and the court, it was conceived of as a triangle. It imposed on the court and the parties specific procedural obligations to perform specific procedural acts (to bring an action, a defense in a specific form, to tell the truth, to comply with procedural orders etc.). The procedural relationship ended with the final judgment when *res judicata* applied.⁵ In the 1920s the concept had not been fully developed: legal literature still discussed whether the admissibility of a lawsuit was a prerequisite of the “procedural relationship” or whether the pendency of the lawsuit entailed the existence of this relationship.⁶

Goldschmidt, however, proposed a different approach. Starting from an “empirical notion” he considered the process as a dynamic sequence of judicial situations (*Rechtsslagen*) which – finally – lead to the judgment which became *res judicata*. Therefore, not the rights and obligations of the parties, but their respective situation, their procedural expectations within the unfolding of the proceedings was the starting point. This dynamic approach to procedural law was the different and innovative approach of the book. Goldschmidt considered the position of the parties within the proceedings not as an implementation of subjective rights but rather as a competition striving for advantages and positive outcomes within the procedural framework⁷. It should be noted that this approach (the reliance on the uncertainty of parties involved in litigation) was influenced by his personal experiences during and after the First World War.⁸ In the first part of the book Goldschmidt tried to deconstruct an old paradigm – mainly by referring to Roman law (p 6-75) and not to the Code of Civil Procedure.⁹

In the second part, Goldschmidt explained the legal situation within the process by a set of proposed legal terms, especially notions such as “prozessuale Last”,

⁴ For a modern explanation cf. Rosenberg/Schwab/*Gottwald*, *Zivilprozessrecht* (17th ed. 2010), § 2.

⁵ It should be mentioned that some authors also elaborated a similar relationship during the enforcement, see G. Lüke, *ZZP* 108 (1995), 441 et seq.

⁶ *Goldschmidt*, *Prozess als Rechtslage* (1925), p. 4 et seq.

⁷ *Goldschmidt*, *Prozess als Rechtslage* (1925), p. 268, 277, 280.

⁸ Preface, p. V and VI.

⁹ This methodological approach – based on legal reasoning of the 19th century – was criticized by *Neuner*, *Der Prozess als Rechtslage*, *ZZP* 51 (1926), 44.

Prozesshandlung (of the parties and the court), Erwirkungs- und Bewirkungshandlungen etc. This terminology was not entirely new, but Goldschmidt placed it in a different perspective. His main objective was to avoid any “obligations” or “rights of the parties” when engaged in litigation – it is the respective procedural situation of the parties (and to some extent the court) expecting the judgment which counts. From this angle, many detailed issues are addressed, mainly with the objective of demonstrating the value of this “new approach” to procedural law. This approach is based on the fundamental assumption that procedural law must be comprehensively separated from substantive law.¹⁰ This detachment from substance permitted him to address civil and criminal proceedings at the same time. However, in this respect the author went much too far and reached a high degree of abstractness. The result was the creation of a self-standing but largely meaningless terminology which could equally apply to civil and to criminal proceedings. Due to this perspective, the objective of civil litigation, i.e. the determination and enforcement of civil rights, was lost. However, it is a truism that the subject matter of civil litigation is based on private rights which obviously derived from substantive private law.¹¹

It seems necessary to add an additional remark about the style of the book: Goldschmidt elaborates his theory of civil process by addressing different issues of civil process such as admissibility of the action, legal acts of the court, of the parties, res judicata etc. When discussing these issues, Goldschmidt starts by referring to the state of affairs in legal doctrine; legal provisions of the civil or criminal procedural codes are quoted as examples of a pre-existing system. The book is full of value statements directed at the opinions of his fellow colleagues and it develops a legal reasoning aimed at demonstrating the superiority of his new theory which he considered to reflect procedural law in the only appropriate and, therefore, superior way. However, surprisingly, Goldschmidt, did not implement his theory of the legal situation as a tool for describing the unfolding of civil proceedings (from pendency to res judicata and enforcement) – an approach which is today commonly found in modern treatises of civil procedure.¹²

¹⁰ The basic assumption is found in his *Treatise on Civil Procedure* (2nd ed 1932), p. 1, where he explains that the objective (“Wesen”) of civil proceedings is to verify whether the plaintiff has a right for legal protection against the State (“Das Wesen des Zivilprozesses ist die Prüfung, ob die Voraussetzungen eines Rechtsschutzanspruchs des Klägers gegenüber dem Staat vorliegen ...”).

¹¹ *Henckel*, *Prozessrecht und materielles Recht* (1970), p. 50 et seq.

¹² Cf. *Murray & Stürmer*, *German Civil Justice*, p. ; *Jauernig/Hess*, *Zivilprozessrecht* (30rd ed. 2011), §§ 23 and 32.

III. Some remarks about the author

The presentation of this book would be incomplete without any reference to the life and personal fate of James Goldschmidt. Born in 1874 to a Jewish family,¹³ he studied law at the faculties of Berlin (Humboldt) and Heidelberg. He became Dr. jur. in 1895 at the Humboldt-University in Berlin, with a thesis specializing in criminal law. The same legal area was explored in his habilitation thesis in 1901 (under the supervision of Jürgen Kohler and Franz von Liszt) which addressed the criminal law of the administration.¹⁴ In 1908 he became an extraordinary professor with the status of a civil servant. Only after the First World War was he nominated ordinarius and in 1921 he was appointed to a chair for civil and criminal procedural law. In 1931 he was elected dean of the faculty.

In 1933 his fate changed dramatically. In September 1933, Nazi legislation and administration removed him from Humboldt University and he had to continue (without any chair) at the University of Frankfurt. Although he was able to regain his attachment to Humboldt University in 1935, he was prohibited from giving any lectures in Germany. Therefore, Goldschmidt started teaching and lecturing activities in Spain at the universities of Madrid, Barcelona, Valencia, Seville and Saragossa. When the situation in Germany became unbearable for him and his family, he finally decided to emigrate and obtained a visa from the police president in Berlin in December 1938 for “emigration to England”. In the same year Goldschmidt immigrated to Uruguay. In Montevideo he taught at the law faculty until his sudden death in June 1940.

There is one additional specific point in this tragic life of James Goldschmidt which should be mentioned: As a result of his persecution under the Third Reich he also lost to some extent the connection to his former scientific environment in Germany. Most of his scientific works after 1933 were written in Spanish and are more or less unknown in Germany even today.¹⁵ During the last period of his scientific life he mainly focused on legal philosophy and criminal law, and not as much on civil procedure.¹⁶

¹³ His father was an influent banker, see *Sellert*, James Paul Goldschmidt (1874-1940). Ein bedeutender Straf- und Zivilprozessrechtler, in: Heinrichs / Franzki / Schmalz / Stolleis (eds.), *Deutsche Juristen jüdischer Herkunft* (1993), p. 595, 607 et seq.

¹⁴ In modern terminology: Ordnungswidrigkeiten.

¹⁵ *Sellert*, in Franzki et al. (ed.), *Deutsche Juristen*, p. 595, 610 s. In the library of the MPI Luxembourg, there is a small book of *Goldschmidt*, *Derecho Justicial Material* (1959), a translation of his “Materielles Justizrecht” of 1905 with an addendum, written by his son *Roberto Goldschmidt* (who became a law professor in Argentina), adapted to the legal situation in Argentina. This book is part of the Tarzia collection of the library of the MPI Luxembourg.

¹⁶ *Sellert*, James Paul Goldschmidt (1874-1940). Ein bedeutender Straf- und Zivilprozessrechtler, in: Heinrichs / Franzki / Schmalz / Stolleis (eds.), *Deutsche Juristen jüdischer Herkunft* (1993), p. 595, 607 et seq.

IV. What can we learn from James Goldschmidt today?

Although Goldschmidt is often quoted as a classic of civil procedure, his basic idea of replacing the concept of the procedural legal relationship with the notion of the sequence of judicial situations was not entirely successful. Today, most of the pertinent text books on German civil procedure combine to some extent the attractive paradigm of the procedural legal relationship with Goldschmidt's approach of the sequence of judicial situations.¹⁷ At the very end, this does not seem to be a bad outcome: On the one hand, it goes without saying that there is a kind of legal relationship between the parties and the court during civil litigation. This situation is much more visible in the context of arbitration where the legal relationship of public law is largely replaced by the private and contractual legal relationships between the arbitral tribunal and the parties. However, the process must be considered as a sequence of different situations which progresses from the bringing of the law suit until the judgment becomes *res judicata*. This dynamic of the process has in modern textbooks become the most useful angle for describing procedural law.¹⁸

When Goldschmidt published his book in 1925, it could hardly have been considered as a great success. Quite the contrary, most of his colleagues at the time immediately took it up and criticized it very sharply.¹⁹ This was not a surprise, but was mainly due to Goldschmidt himself who had strongly attacked the predominant legal doctrinal position of his time as outdated – a critique which was obviously not welcomed by his colleagues.²⁰ In addition, the terminology developed and used by Goldschmidt was an additional disadvantage or barrier for the reader of the book: Although there are many interesting details and thoughts, access for the reader was, and is, impeded by his difficult style of writing and use of abstract terms.²¹

Finally, it is certainly correct to consider Goldschmidt the pinnacle of the German school of legal thinking of the 19th century. His book must be considered as an attempt at conceptualizing procedural law from one specific angle (the procedural situation) and separating it entirely from its subject matter (the adjudication of private rights). The critical reception of this concept finally demonstrated that procedural law cannot be explained by the process itself. *Wolfram Henckel*, in his classic book “*Materielles Recht und Prozessrecht*” of 1970, took the opposite view

¹⁷ *Bruns*, ZZP 88 (1975), 121, 122 et seq.

¹⁸ *Jauernig/Hess*, Zivilprozessrecht, § 32.

¹⁹ *Bruns*, ZZP 88 (1975), 121, 122.

²⁰ *Sellert*, in Franzki et al (ed.), *Deutsche Juristen*, p. 595, 608 („zum Teil polemisch formulierter Widerspruch.“).

²¹ It should be noted, however, that *Goldschmidt's Zivilprozessrecht* (2nd ed 1932), is much clearer in the terminology used.

by qualifying civil proceedings as a framework to protect and to implement substantive private rights²² Henckel qualifies procedural law as public law marked by public law principles such as equal treatment of the parties, the right to be heard, the right to bring a defense. Today, the development of general principles,²³ often derived from constitutional law, dominates procedural doctrine, at least in Germany. On the other hand, focusing on the substantive private rights which are enforced in civil proceedings permits determination of the objective of procedural norms when it comes to their interpretation. However, these procedural principles and guarantees apply to the specific procedural situation of the parties in the legal process as was correctly observed and described by James Goldschmidt.

²² *Henckel*, *Materielles Recht und Prozessrecht* (1970), p. 61: „Verfahren zur Rechtsausübung“.

²³ See nevertheless, *Goldschmidt*, *Zivilprozessrecht* (2nd ed 1932, p 11 („Grundsätze des Verfahrens“) providing for the following list of „principles“ (without explaining their function): party disposition (*Verhandlungsgrundsatz*), concentration of proceedings; orality (*Mündlichkeit*); immediacy of the taking of evidence (*Beweisunmittelbarkeit*); free evaluation of the proofs (*freie richterliche Beweiswürdigung*); public hearing.