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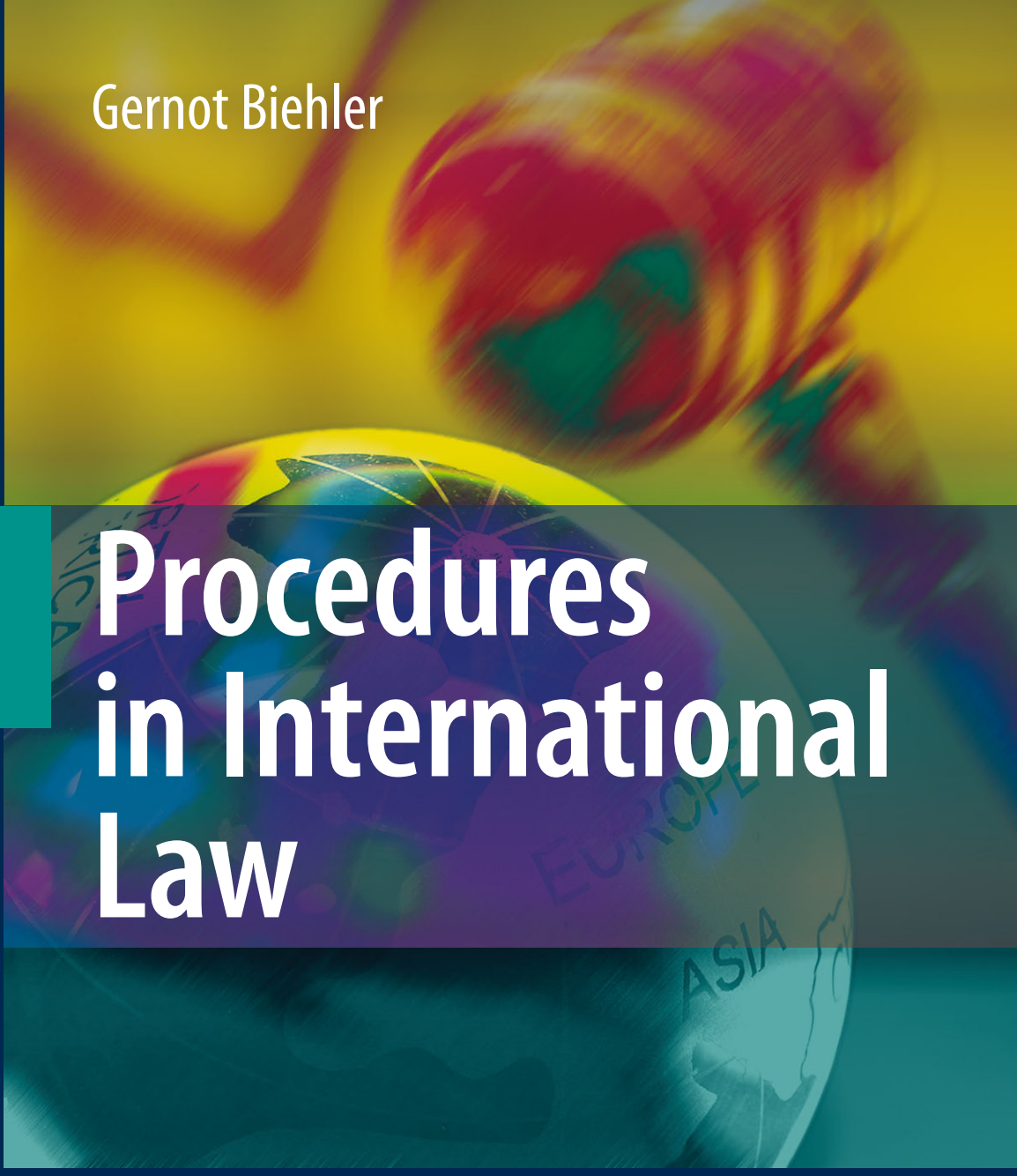


# Procedures in International Law

Springer

*Chapter 3*

# The Quest and the Notion

Is there any notion of legal proceedings common to both national and international law which may lead to a better understanding of the genesis of law? Having reviewed the procedural notions used in national and international law in some detail there seem to be substantial differences between them despite a common terminology. However, to find a useful common notion it may be necessary to disregard the different fields of applications on the common functions of procedures. A few thoughts on a possible perspective may help.

## 3.1 Aim of the Inquiry

The aim of legal procedures is to give effect to substantive law. Legal proceedings originate in authorities which establish procedures, for example, a state or an international organisation. Procedures reflect their origin if the interests of the founding authority are at stake. Therefore, two properties of all procedures may be distinguished; the serving character towards substantive law which ideally is absolute and would always tend to shape procedures in a way which enables substantive law to become effective and would lead to a soft and flexible approach to all procedural formalities (statutes of limitation, formal requirements). On the other hand a limiting character of legal proceedings may be found primarily when interests of the authority which entertains the proceedings are at stake or when formalities no longer serve the ultimate aim of all proceedings which is to make substantive law effective. This applies both to the comprehensive legal procedures of national courts and to the fractured ones seen in international adjudication while the independent strength of national procedures would tend to allow for more authority and less discretion which has the effect of developing more formalities which are not necessary in view of the ultimate aim of procedures. Procedures would determine law.

## 3.2 Empirical Approach

To many these basic observations may suffice. Common opinion may hold that procedures are necessary but that to dwell on them separately is a waste of time. Why it is worth developing a more sophisticated notion of international procedures?

Looking at the actual working procedures in contentious cases could be potentially useful in dealing with similar cases. A rather abstract notion of procedures would not necessarily be seen as useful for this approach. This common view seeks to apply knowledge directly and to see its immediate practical and economic use. Does it help my case and does it pay off? To put it briefly here meets this attitude suggested by those more interested in tools, tricks and practice. And it is exactly this which fuels the machinery of legal proceedings. Translating this attitude into an academic approach would best foster these interests. To look at existing procedures empirically, taking stock of how many cases are proceeded with in which forum incurring what costs applying what law in what way and deducing from it solidly based recommendations of how to do better may indeed be a worthwhile task. And indeed a little of this may also be found herein, for example, when discussing the different bases of national jurisdictions and the "Italian Torpedoes".

However, this is not all. There is another side of academic insight which pretends to understand the essential nature of notions used and to define their fundamental properties generating usefulness transcending the practical case to case perspective. To imprint a certain understanding by clarifying a notion through logic and beyond by unfolding its inherent idea is another approach which does not lend itself to such easy applause as the empirical one. Academic in the tradition of the original Athenian Academy it merits some short explanation.

Notions can be particularly powerful and although this may be the case everywhere where words are used this power of notions is particularly obvious in the field of law and especially in international law. Suggesting human rights violations, war crimes, exclusive jurisdiction or national sovereignty is a strong contention due to the highly charged nature of the notions used. Their power stems rather from inherent values and ideals transported through these and other notions than from their empirical use or success in past precedents as great as these may be. It is an appeal to a higher order of things which carries the weight in legitimising action when, for example, a threat to peace or an act of aggression is maintained by the UN Security Council to open certain proceedings. A most striking example is the notion of sovereignty. It focuses many state competencies in the international field in an unmatched way. Its use still carries an elaborate meaning originally established in the writings of Jean Bodin but today it even draws together other state properties such as independence or jurisdiction far beyond its historical use when invented to strengthen the claim of the French king to power towards the other estates of the realm. Although originally a notion to describe internal constitutional competencies its change today as denoting first and foremost the international status of states in their relation to one another is remarkable. The idea of a state as a single legal personality with all its extraordinary effects in international law is hardly conceivable without the development of the notion of sovereignty. Today somewhat overcharged with meaning and historical and current understanding the term sovereignty may be at a breaking point. However, it is still a telling example of a notion whose effects and imprints on international law for

centuries and some time to come cannot be discovered by evolving its inherent meaning. In contrast to the term of sovereignty the notion of procedures has not seen an equivalent development. As sovereignty may be overcharged with meaning, procedure may be "undercharged" with any specific meaning and understanding. Devoid of substantial meaning and a political or philosophical history it is more a virgin and poses a special challenge when seen on its own merits. Some leniency of the reader is sought to nevertheless discover notional and legal understanding of legal proceedings in an international context.

## 3.3 Form and Contents, Procedures and Law

A preliminary hint to the relationship between form and contents may help. Thomas Aquino distinguished form from substance by considering form as an external expression of substance in the metaphysical tradition of Aristotle. The substance of a coin is the metal but its form is a coin. All that exists has a form in which any substance dresses itself and something which has no form cannot exist. Equating form with procedure and substance with substantive law, procedures serve the same aim as form does; the numerical value of a coin printed on its surface clarifies its contents which are its weight and metal composition representing its value. The function of the coin's form is to render this beyond doubt and debate making the coin current for ulterior purposes. Through procedures substantive law is clarified, "coined" and brought beyond doubt when culminating in a decision. Procedures make it possible to distinguish final legal acts from mere preparatory acts or lastly irrelevant considerations (*obiter dicta*). It helps the discretion, facilitates the production of evidence and makes law accountable and verifiable. This is why form and procedure are seen as inherently useful. However, if forms and procedures are allowed to be used without regard to their inherent function of giving effect to the law, they may do exactly the reverse; some requirements may be invented or used in procedures to ultimately prevent the administration of justice. An obsession to adhere to real or fictional formal requirements comes from this and earns some a living but the principle of good faith that still supports substantive law is done a disservice. Any procedure and form serves a social function or an ulterior aim which when not recognisable any more must render form and procedure useless. Stability and flexibility; form and procedure gives reliability and stability; substantive law would ever again require flexibility of forms and procedures to achieve effect. They may be regarded as the two pillars of legal practice.

To get back to the coin; procedure may be seen as the form of substantive law obtaining its essential face through it while without it there will be no face at all. Substantive law will not materialise without procedure. The potential applications and uses of substantive law may be likened to a piece of raw marble (to get away from the ore of the coin) before Praxiteles or Michelangelo got their hands on it. With all its innumerable uses it lacks the essential; getting into being (recognised).

In international law this basic thought is essential; if there is no authority which provides a procedure the abundance of substantive law will stay unrecognised. Neither the authority providing a procedure nor the related enforcement can be disregarded. To sharpen the view for the underlying form and procedure when international law is generated is the focus here and the approach of the book. International law as opposed to national law is an inchoate legal order because there is no consistent procedure to always give effect to it. When there is a procedure then there is law. To see law in this field with its essential procedural roots without which it would wither away in a nothing may help to *cognoscere rerum causas*.