Law, practice and convention in the constitution of the European Union
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1. Motives, concepts and method of study

1. Structure and development

Constitutional conventions are not a dominant topic of EU constitutional scholarship. In fact they are all but ignored. The present study is intended to prove this situation to be unjustified and to claim a prominent place for the subject. Conventions, in the sense intended, are political rules about the exercise of legal powers. They suffer neglect by scholarship due to their falling between categories. On the one hand the rules in question are not legally binding, which can help explain their disregard by legal scholarship. On the other hand they do have normative force, which explains why political science cannot well, or at least not fully, do them justice.

In the study of the European Union's constitution to involve such conventions pays in several ways. For one thing, conventions often reveal where real power lies and how that power is exercised. They show how constitutional actors interpret the legal rules that confer them powers, and they expose structural relations of power. Conventions are significant for creating constitutional structure.

Next, constitutional conventions are intimately bound up with constitutional development or evolution. Together with case law, conventions allow a constitution to evolve gradually in the absence of formal amendment. Often they are related to great moments of constitutional history, alive with conflict, power struggle and change. That explains their significance for constitutional development.

Even though studies of the constitution of the European Union only rarely use analyses in terms of convention, the conflicts that give rise to convention do receive ample attention. No serious textbook of European integration, European politics or European Union law will fail to devote attention to the important ‘Empty chair crisis’ of 1965 and the Luxembourg Compromise that solved this constitutional crisis. It is argued in this book that the consequences of the Luxembourg Compromise are best understood in terms of law, practice and convention. However, it seems that, half a century after this crisis paralysed the European Union, a beginning has only been made with an analysis of the significance of convention for
the constitution of the European Union.¹ This book intends to give it a more solid basis both in theory and in historical fact.

The fact that conventions do have a structural impact on the EU’s constitution can be well illustrated by the history of that crisis and its aftermath. In 1965 France decided to leave its seat in the Council of Ministers unoccupied in order to prevent the change to qualified majority voting in the Council. It wanted to retain an ultimate power of veto, while the other five member states argued that qualified majority voting should be available. No agreement was found on this point – not even in the Luxembourg Compromise – but a specific commitment developed in the aftermath of the crisis. It is the commitment between a number of member states in the Council to support the invocation of a veto by one of them when a fundamental interest of that member is at stake.

A recent anecdote will show how this commitment is deeply rooted in Europe’s constitution, both in terms of duration and of the impact on the functioning of qualified majority decision-making. Jochen Grünhage, former German deputy permanent representative in Brussels, in an interview told the present author about the Internal Market Council meeting of 7 December 1999:

During the lunch break political issues were brought up, with the UK arguing that these were fundamental interests for them. The term vital interest was avoided, because it was considered old-fashioned, reminiscent of the French tradition. Maybe the French themselves will now not even use the term. But in substance invoking a fundamental interest was the same thing.
After the break, during the Council meeting at which the German Minister was absent and I took his place, I asked: “Am I right that the United Kingdom invoked something we should not invoke anymore in the internal market? And that the Commissioner does not object to this?” What followed was complete silence in the room.²

The way in which the United Kingdom blocked the adoption of the Artists’ resale rights directive provides a telling example of the kind of dynamics that are studied in this book. From a strictly legal point of view not much happened: one of the decisions on the Internal Market Council’s agenda of 7 December 1999, which could have been taken by a qualified majority vote, simply was not adopted. From a political point of view, however, there was much going on. There were tough negotiations in which one of the large member states managed for over a year to block a decision that all the other Council members could have

¹ One study that needs to be mentioned here is that by Bart Driessen, who discusses the role of written convention in the European Union in the form of Interinstitutional Agreements. Bart Driessen, Interinstitutional Conventions in EU Law (London, Cameron May 2007).
² Interview with Jochen Grünhage (former German member of ‘Coreper I’), Brussels, 12 February 2008.
lived with, and eventually to turn it into a watered down directive, with prolonged transition periods.

To know how the United Kingdom managed this, it does not suffice to focus on that state’s bargaining power. Behind the factual dynamics of this episode lies the commitment between a number of member states to support the invocation of a veto whenever a fundamental interest of one of them is raised. This commitment, often associated with the 1966 ‘Luxembourg Compromise’, is considered by many a relic from the past. It is true that the commitment has always been denounced and contested by a number of members of the Council. Because of its contentious character, it has been difficult adequately to qualify or define the commitment, and lawyers have even tended to deny its existence. To make matters worse, the debate about its existence has been poisoned by principled positions about the question whether it should exist.\(^3\)

Interestingly, even though from a legal point of view the scope of the qualified majority voting procedure in the Council has been extended to many policy areas over the last few decades, the above-described commitment has been tested only rarely. This is to do with another commitment under Council qualified majority voting, which is for members to take into account the interests of a member state that is particularly affected by a decision, even in the absence of an invocation of a vital national interest. On top, there is a general practice that efforts are made in the Council and in Coreper\(^4\) to accommodate all members and most decisions are in fact taken by consensus.

The above rules and practices are not the same and need to be keenly distinguished. All three work to limit the exercise of the legal power to adopt decisions by qualified majority and thus affect the structure of the constitution of the European Union.

Together they indicate how qualified majority decision-making cannot be understood from reading only the relevant Treaty provisions. It is necessary to know how these legal rules are applied in practice and especially what the conventional rules are about the exercise of legal powers. A conventional rule adds a non legal but structural element to the legal constitution of the European Union and it impacts on the division of powers.

Not only the structure of the constitution can be better understood when, next to law and practice, convention is taken into account; this equally holds for its development. A case in point is the appointment procedure (investiture) of the European Commission, which has undergone a strong development over the years. Successive treaty amendments have granted the European Parliament the power not only to approve the college of Commissioners but

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\(^3\) See in more detail chapter 3.

\(^4\) Coreper (Comité des Représentants Permanents) is the body of (deputy) permanent representatives of the member states that prepares the work of the Council.
also, separately, its President. But the treaty amendments taken alone will hide, for one thing, the important development from collective to individual political responsibility of candidate Commissioners.

It was the European Parliament, which began to establish individual responsibility in the appointment procedure, by organising committee hearings for individual candidate Commissioners as of 1995. A next step was taken when the Parliament obtained the withdrawal of two candidates (Buttiglione and Udre) together with a reshuffle of portfolio for a third candidate (Kovács) in 2004. The individual responsibility can be said to have matured in 2010 by the withdrawal of a singular candidate Commissioner (Jeleva) not acceptable to a majority of the European Parliament.

These developments are not a matter of the Treaty provisions. On the other hand, the appearance of candidate Commissioners before a parliamentary committee hearing should also not be understood as mere practice, without obligation.\(^5\) Why do candidate Commissioners appear before a hearing? They appear simply because they have to, albeit not on the basis of a legal obligation, but of a conventional one.

As is the case with constitutional structure, attention is lacking for the role of convention in the development of the constitution of the European Union. This is in stark contrast with the attention paid to the EU's judicial constitutionalisation by the European Court of Justice.\(^6\) It is also not to be confused with constitutionalisation through mere practices.\(^7\)

2. Practical relevance and objective

2.1 Why constitutional conventions are conceptually relevant for both lawyers and political scientists

It is sometimes claimed that conventional rules are always legal rules. This position can only be maintained by denying the existence of normative social rules and by considering all


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binding rule as legally binding. A concept of law as broad as this goes beyond all prevailing concepts of law. It even stands in the way of our understanding reality.

It is better to see convention as a fixation of the interpretation given to legally binding rules given by the actors themselves. This interpretation exists parallel to the interpretation given to legal provisions by courts in their case law, a phenomenon lawyers are more familiar with. In the field of constitutional law, and particularly with regard to those provisions dealing with the division of powers between institutions, political actors themselves are often more prominent interpreters of legal provisions than courts are.

In other words, departing from a formal legal reading of the constitution does not mean entering legally irrelevant terrain. Recognition of the existence and impact of conventional rules is important legally as they are necessary to understand even the legal constitution of the European Union. Teaching the law without its application in practice or the rules that may follow from it may lead to a distorted picture of the reality of the constitution. This argument is not entirely new, but at the level of the European Union much can still be gained if this is accepted.

Conventions are also relevant for political scientists, as they provide an explanation of why political actors behave the way they do. Political scientists who try to explain and predict behaviour, may use a variety of factors to these ends. These factors include informal rules and institutions (in the specific sense used in political science), which are closely related to conventions, a relationship which needs further elaboration.

Finally, the relations and checks & balances between constitutional actors are relevant for political scientists as well as for lawyers. The issue of the relationship between convention and the balance of power must be tackled, taking into account the different notions of bargaining power, legal powers and conventional powers. A constitution is not only about the limitation of powers, but also about their conferral. Conventions can confer conventional powers as legal rules confer legal powers. Together they can be said to determine the actual powers of institutions. Conventions moreover are among the elements that determine the bargaining power of institutions, next to their formal legal powers, their resources, their sensitivity to failure, their time horizons, etc.

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9 Cfr. Bogdanor: ‘A constitution forms the basis of the legal order of the state. But a constitution is also a ‘power-map’ tracing the normative relationships between government and citizen. Thus constitutions, insofar as they are concerned with power, are as much the concern of the political scientist as of the constitutional lawyer.’, Vernon Bogdanor, *Politics and the Constitution. Essays on British Government* (Hants, Dartmouth Publishing 1996) p. xi.

10 See in more detail chapters 2 and 5.
Take the example of the European Union’s multi-annual budget. For decades the Treaties gave the European Commission the legal power to determine the maximum rate of increase of so-called ‘non-compulsory expenditure’. This is expenditure not prescribed by the Treaty or by secondary legislation, on which the European Parliament has the last word. However, in defiance of these Treaty based powers, the European Council has come to control the limits of all expenditure, including non-compulsory expenditure, as a central element of a newly created ‘multiannual budgetary procedure’.\textsuperscript{11} This multiannual budgetary procedure was created outside the Treaty framework; nevertheless it had a clear impact on the powers of the institutions involved. The conventional power of the European Council to establish the limits of all expenditure supplemented the law and limited the exercise of legal powers of the European Commission, European Parliament and the Council. Many other examples are given in this book.

2.2 \textit{The bridge between law and politics}

On a more abstract level, to ignore the role played by convention is to miss the role of politics in the constitution of the European Union and even the relation between constitutional law and politics. This is because conventions can be seen as a product, or a part, of the political constitution, affecting the legal constitution in various important ways. They allow the political constitution to claim autonomy from, and even primacy over, the legal constitution.\textsuperscript{12}

2.3 \textit{Objective and delimitation}

The central objective of this study is to address the lack of attention given to convention in academic literature on the European Union by identifying and studying the significance of convention for its constitution.

This can be considered as an attempt to improve our understanding of various aspects of the constitution of the European Union. No critical analysis of what the legal and conventional rules of the constitution of the European Union should look like, is provided. Nor is this an ethical study focusing on the question whether the existence of constitutional conventions in the European Union is a good thing or not. Too often scholars blur the distinction between describing what the reality of the constitution is and what it should be (examples will be given later on).

At the end of this book some final remarks are made on possible future research of the question whether the existence of a conventional constitution is a good thing. In fact, this

\textsuperscript{11} See in more detail chapter 4.
\textsuperscript{12} See in more detail chapter 5.
study can be seen as illustrating the relevance of that question. It is a question however that would need a theoretical framework not given in this book. Thus, when the adjective ‘normative’ is used in this book it does not relate to what is good or not good, but to behaviour prescribed by an existing legal or political rule.

No exhaustive list of conventions is attempted. The focus will be on the identification of conventions in order to argue their existence and their crucial role. This will allow a general and systematic analysis of their significance.

3. **The central question**

The following research question will be central to this book:

> What role does convention play in the structure and development of the constitution of the European Union?

This question needs some preliminary clarification of its main building blocks and concepts.

3.1 **Role: identification and significance**

It is useful to split the question about the *role* played by convention in the constitution of the European Union for analytical purposes into two: the *identification* of convention and its *significance* for the constitution.

Both questions are threads running through this book. This is certainly the case in a practical sense of the individual phenomena analysed and their impact on specific legal (Treaty) rules. In each chapter constitutional events and instruments that affect the division of powers between the institutions are studied using the analytical distinction between law, practice and convention. This leads to the identification of phenomena that, it will be argued, are best understood as constitutional conventions. At the same time this leads – in each chapter – to an analysis of the concrete impact of these conventional rules on the exercise of formal legal powers.

However, with regard to theoretical questions relating to identification and impact a differing emphasis is required and therefore chosen. The obvious reason for this is that identification must in a logical sense precede an analysis of significance. In other words, it must first be convincingly argued that some phenomena are better understood as convention than as mere practice, customary law or legal agreement, before questions of significance and meaning are considered.
Therefore, in the first chapters greater emphasis will be placed on theoretical issues relating to the identification of convention, such as questions on methodology and definition. The added benefits of an analysis of the constitution of the European Union in terms of law practice and convention compared to the existing approaches in political science and law will be discussed in chapter 2. The next chapter will demonstrate how some constitutional events and dynamics are better understood if the distinction between practice, convention and customary law is accepted. How some constitutional instruments are better understood if the distinction between conventional and legally binding agreements is accepted is the subject of chapter 4.

In the last substantive chapter the emphasis will shift to the theoretical issue of significance, including the meaning of convention in relation to the structure and development of the European constitution (chapter 5). This will allow to me to tackle a number of fundamental problems. How do conventions relate to the political constitution? How does the conventional constitution affect the structure of the formal legal constitution? What characterises conventions as a source of constitutional development? On a more abstract level these are questions about the relationship between law and politics in the constitution of the European Union or about the relationship between the legal and the political constitution of the European Union.

At this point already, something needs to be said about the concept of constitution.

3.2 The concept of constitution

Central to this study is our understanding of the role of convention in the constitution of the European Union. What is meant by the word constitution? Much academic attention has been given to the question whether the European Union has a constitution and whether it should have one.13 This discussion has not ended with the failure of the Constitutional Treaty.14 The debate illustrates the many different meanings that can be given to the word constitution.

In this book the word constitution is used for the rules on the organisation, definition and limitation of public powers. This is a common use of the word constitution;15 it is what

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Raz has called the *thin* sense of the notion of constitution.\textsuperscript{16} It is close to the concept of *material* constitution and could also be seen as the *technical* or *functional* sense of the constitution.

It is this constitution of the European Union, whose existence is least controversial. No principled position is at the basis of this choice of the concept constitution here. It is chosen because the understanding of just this aspect of the constitution can be improved through a study of the role of convention.

Even though the concept of constitution is itself not at issue in this book, it is necessary to explain the concept at the outset. The meanings given to the concept ‘constitution’ are manifold and they are generally inspired by the concept as it is known from states. A number of characteristics relate to – what has been called by Raz – the constitution in its *thick* sense: it is of long duration, has a canonical formulation, constitutes a superior law, is more difficult to amend than ordinary legislation and expresses a common ideology.\textsuperscript{17}

Next to the distinction between the thin and thick sense of a constitution, also the distinction between a material and a formal constitution is helpful. The *material* constitution may consist of the totality of fundamental legal norms that make up the legal order of a polity,\textsuperscript{18} or the norms that determine the conditions of validity of general and abstract legal rules.\textsuperscript{19} Then there is the definition of the material constitution focusing on the function of rules, namely as the set of norms that organises, guides and constrains.\textsuperscript{20} This material constitution is often considered as a legal concept – and necessarily so when related to the conditions of validity of legal rules or fundamental rights\textsuperscript{21} – but when related to the function of the norms of organisation and constrain public powers it can open up to include non-legal rules. The *formal* constitution relates to a number of characteristics of Raz’s thick sense of the constitution: it is a written document, which is of the highest rank and comparatively more difficult to amend than other rules.\textsuperscript{22}

\textsuperscript{20} In this sense, Kumm (2006) p. 508.
\textsuperscript{21} Note that the law that governs the relationship between the individual and the state is also generally considered part of the constitution. Cfr. Anthony Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 13th edition (Essex, Pearson Education Limited 2003) p. 9.
It is helpful further to distinguish between a constitution in the technical or functional sense and a constitution in the existential sense. The notion of constitution as used in this study can be seen as the technical or functional constitution, as it focuses on the functions of establishing, defining and limiting public powers. This can be contrasted with what I would like to call a constitution in the existential sense. A constitution in the existential sense relates to the political basis of a constitution. Several definitions given to the concept of constitution seem to relate to this sense of the constitution, such as an act taken by or attributed to the people, the foundation of legitimate political authority or a legal order that is self-sustaining.

As a result of the many faces of the concept of constitution, there is a great variety of arguments for and against the existence of a constitution of the European Union. It is clear that the use of the word constitution throughout this book – as the rules that organise, define and limit public powers – is only one of the ways in which it is regularly used. It is widely agreed that the European Union has such a constitution. Craig, inspired by Raz’s distinction between thin and thick constitution, uses the thin sense of constitution for ‘the law that establishes and regulates the main organs of government, their constitution and powers’. Hartley refers to the broad sense of the word constitution with regard to ‘a set of rules that create a legal entity and define the powers of its organs’. And even if the European Union is not a nation state but an international organisation, the existence of its constitution in the thin sense is not commonly contested.

Many positions in the debate on the existence of a European constitution however relate to characteristics of a constitution in the thick or existential sense. These are often used in the argument denying the existence of a European constitution.

Hartley argues that the European Union does not have a constitution in the restricted sense of being legally self-sustaining, as for its existence and validity it depends on other legal systems and the basic Treaties are not a Grundnorm. Similarly, Dyèvre claims that the European Union cannot sensibly be considered to have a constitution, because it lacks legal

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25 In this sense, Christiansen and Reh (2009) p. 42-43 and 46-49.
28 Cfr. Klabbers who (rightly) has no problem to speak of constituent instruments as the constitution of international organisations, see Jan Klabbers, An Introduction to International Institutional Law, second edition (Cambridge, Cambridge University Press 2009) p. 125, 126, 184, 185.
autonomy. Kumm concedes that, while it cannot be seriously disputed that the European Union has a formal and material constitution, it is not clear whether the European also has a constitution in the strong normative sense of constituting a new legal and political authority that is not derived from any other legal authority.

Grimm argues that a constitution in the full sense of the term goes back to an act taken by or attributed to the people, which is not the case for the European Union. Curtin considers that the Lisbon Treaty is business as usual in the sense that it is a material constitution without the ambition to be a democratic or political big C constitution, since it has not been deliberated by the people, either directly or through their representatives.

While Grimm and Curtin apply a similar argument to deny the European Union a constitution, there is nonetheless a difference in the sense that Grimm argues that it has no legal constitution, whereas Curtin claims that it has no democratic or political constitution.

The negative referenda in France and the Netherlands on the Constitutional Treaty in 2005 have even prompted the European Council to declare that the new Treaties would not have a constitutional character. This must in some sense relate to the thick sense of the word constitution, probably its symbolic value expressed by elements like its title, the textual inclusion of the Charter of Fundamental rights (as opposed to a single provision giving it Treaty status), a flag or an anthem, since there are not many substantive differences between the failed Constitutional Treaty and the Lisbon (reform) Treaty.

I must introduce here a final distinction that will prove relevant in my analysis of the significance of convention for creating constitutional structure. It is the distinction, and the relationship, between the political and the legal constitution. The political constitution refers to politics, political rules and the political institutions limiting the exercise of public powers.

By contrast, in the legal constitution judicial bodies limit the exercise of power by enforcing legal rules. It should be noted that no constitution is of only a legal or political character, but constitutions will normally contain elements and characteristics of both.

3.3 The concept of constitutional convention...

34 See the European Council Presidency Conclusions of 21/22 June 2007, Annex I IGC Mandate, p. 16, paragraph 3: “The TEU and the Treaty on the Functioning of the Union will not have a constitutional character.”
35 See in more detail chapter 5.
Constitutional conventions can be shorthanded as political rules about the exercise of legal powers. In this book the use of the concept of constitutional convention is inspired by its use in (mainly) British constitutional theory. A description that reflects the dominant use is that of Wheare:

>[Constitutional conventions] are held to be morally binding and politically binding, but until they are enacted by the appropriate machinery of a state they do not in most countries alter the law or form part of the law.

The many characteristics of constitutional conventions, in terms of their origin and foundation in the perception of actors, their observance and possible ways of enforcement, their relation to and impact on the formal legal rules of the constitution will be discussed throughout this book and related to constitutional events and instruments in the European Union.

3.4 ...and the concept of law

No specific concept of law will be defended within this book. In other words, I have not chosen to analyse the constitution of the European Union through the prism of a particular concept of law. However, for obvious reasons this issue cannot totally be ignored. In fact, one position that is taken with regard to the concept of law is that the position in which all agreement is always law or in which all perception to be bound by a rule always leads to a legally binding rule is rejected. There are limits to the logic of law in understanding the constitution.

Thus, in the analysis of the constitution of the European Union a place will be claimed for convention somewhere in between practice and customary law (chapter 3). What role is attributed to convention will be seen ultimately to depend on whether the continental approach or the British approach to the concept of customary law is followed. However, it is important to note that not only in the British constitution or in the British constitutional tradition a role is played by conventions based on practice or precedent. In the continental approach they may be awarded a smaller role due to a more prominent role of customary law, but their existence is often explicitly recognised. In fact, a total equation of convention and customary law must be rejected.

37 For examples outside British constitutional theory, see e.g. Giuseppe Ugo Rescigno, Le convenzioni costituzionali (Milaan, CEDAM 1972); J. van den Berg, Stelregels en spelregels in de Nederlandse politiek [Conventions and rules of the game in Dutch politics] (Alphen aan de Rijn, Tjeenk Willink 1990); Pierre Avril, Les Conventions de la Constitution (Paris, Presses Universitaires de France 1997).
38 Wheare (1966) p. 122.
Similarly, a place will be claimed in the analysis of the constitution of the European Union for convention somewhere in between a situation of no agreement and a legally binding agreement (chapter 4). It is not necessary to choose a specific concept of law in order to convincingly argue that the position that all agreement is always law is better rejected. In an analysis of written instruments affecting the constitution of the European Union, several elements will be discussed that are considered – in the dominant reading of Interinstitutional Agreements – decisive for their status. These elements often relate to the differences between convention and law in terms of the origin of rules (e.g. legal basis), the perception or intention of parties, the relation of rules to existing legal rules and the enforcement of rules. In the light of these differences, some Interinstitutional Agreements are better understood as convention.

In this study I will thus follow, where possible, the dominant use of concepts, including that of customary law, of soft law, and of legally binding agreement. Sometimes there is a competing use of concepts meaning that the same phenomena are named differently depending on a different use of the same concepts. Where different conceptual choices can be made, these will be discussed and their impact will be illustrated. The best example of this is probably the use of the concept of customary law in the continental approach for rules that are often considered as conventions in the British approach (chapter 3).

From its greater popularity in British constitutional tradition it appears how the role attributed to constitutional convention is intimately related to the concept of law chosen. This can be explained by the greater popularity of a concept of law in which court enforceability is central.\(^{39}\) The question how conventions are different from laws is among the most debated in British literature on constitutional conventions. However, to reduce this debate to the distinction between rules that are court-enforceable and rules that are not court-enforceable is too simplistic. As will be seen, more elements play a role, which do not only define conventions negatively.

The crucial question here is whether the concept as it is used in the British tradition – as politically or morally binding rules relating to the constitution – can be helpful to understand the reality of the constitution of the European Union. This is to be answered in the affirmative. It will be argued that in the constitution of the European Union certain important rules are best understood as constitutional conventions.

Still the precise role reserved for constitutional convention will ultimately depend on the concept of law defended. It is, however, not necessary to establish the exact borderline,

\(^{39}\) Also often heard, but maybe less convincing is the explanation that the United Kingdom has no written constitution.
nor to produce an exhaustive list of the constitutional conventions of the European Union to see the analytical benefits of the distinction between law, practice and convention.

One last point is this. In this analytical exercise the concepts discussed are secondary to the phenomena that are being analysed, in the sense that they are not end in themselves, but they serve to understand the analysed phenomena. These phenomena are action and instruments that originate in the constitution and that structure the relations between the various constitutional actors.

4. Methodology

The methodology applied in this book follows from the central question. A study of the role of convention in the constitution is a study of how powers are exercised and why. It is therefore necessary to include, but also to go beyond, a study of literature on theoretical issues and substantive areas of the European constitution. In this book one step further is taken by the creation of a number of original historical sources for the purpose of the research itself. These are interviews conducted by the author with persons closely involved in the decision-making process of the European Union, and authenticated by them. These persons include (former) members of Coreper, functionaries at the Commission and Members of European Parliament. The interviews are essential foundations for the argument. Other historical sources that have been used include newspaper articles and official documents.

Further methodological reflections with regard to conventions based on practice or precedent can be found in chapter 2. In that chapter the added value of an analysis in terms of law, practice and convention compared to dominant approaches will be shown. This serves to discuss the relations of my analysis with existing social science, legal and historical methods.

5. Outline

Chapter 2 tackles some methodological issues on the bases of a discussion of the third reading of the early co-decision procedure (now the ordinary legislative procedure). This will serve to confront the present study with existing approaches in political science and legal scholarship. Interpretations from the latter approaches – with regard to the division of powers in the third reading of the co-decision procedure and the disuse of the Council’s third reading powers – will be contrasted with the results of an analysis in terms of convention in order to show its added value. This allows me to reflect on the nature of the particular approach adopted in this study.

40 See Annex I.
Chapter 3 will claim a position for convention based on practice or precedent in the analysis of the constitution of the European Union next to practices on the one hand and customary legal rules on the other hand. The argument will be made on the basis of a history of qualified majority voting.

Chapter 4 is about the necessity to distinguish between legally binding agreements and conventional agreements in the analysis of the constitution of the European Union. Interinstitutional Agreements dealing with the division of powers between the institutions of the European Union allow me to make this point.

Chapter 5 moves to a more abstract level. It will tackle the question about the role of conventions in the constitution of the European Union not only in terms of individual rules, but also of their significance and meaning in a more general and systematic fashion. To this end I will focus on the question how constitutional conventions affect our understanding of constitutional structure and development. The distinction between a political constitution and a legal constitution is used as the main analytical tool.

Finally, in chapter 6 conclusions will be drawn on the relation between law, practice and convention in the constitution of the European Union and on conventions and the relation between law and politics in that constitution. Questions for future research will be identified.