Law, practice and convention in the constitution of the European Union
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The constitution of the European Union is shaped by a great number of phenomena, which cannot be well understood without the concept of convention. These politically binding rules, different from mere political practices on the one hand and from legally binding rules on the other, create constitutional structure, as do legal rules and rulings.

More specifically, a number of phenomena are better understood as conventional rules based on practice or precedent, than as a mere practice or as a customary rule (chapter 3). Examples of these phenomena are the disuse of the Council’s third reading powers in the early co-decision procedure (between the Treaty of Maastricht and the Treaty of Amsterdam), the obligation of candidate Commissioners to appear before a parliamentary committee hearing as part of the investiture, the power of Parliament to force the withdrawal of these candidate Commissioners, the commitment between a number of members in the Council to support the invocation of a veto when a vital national interest is at stake under qualified majority voting and taking into account the interest of a member state whose interests are particularly effected under qualified majority decision-making.

What characterises these phenomena is that there is not only an expectation of the mentioned behaviour, but that there is also a strong normative character to it, better understood as an obligation. The obligation is not a formal legal obligation, but actors nonetheless perceive that they are bound by a moral or political rule. This perception can find its basis in a rationale behind the rule, in the conflict at its origin or in agreement (chapter 3, paragraph 2.1).

The concept of convention, generally understood as characterised by the element of political or moral obligation, in its contrast to the concept of practice offers analytical precision, which is lacking in the political science concept of (informal) institution (chapter 3, paragraph 2.2). And while there is a partial overlap between the concept of convention in the British approach and the concept of customary law in the continental approach, the category of customary law in the latter is nonetheless strict enough (opinio iuris is required) to argue that there is an independent role for convention in both approaches (chapter 3, paragraph 4.1).

Furthermore, other phenomena are better understood as conventional rules based on written agreement than as legally binding agreement (chapter 4). Examples of these agreements are the Interinstitutional Agreements on budgetary discipline, the Financial Perspectives
contained in these agreements, the Framework Agreement on relations between Commission and Parliament, the Ioannina Compromise and the Luxembourg Compromise (note that what was agreed to in the latter agreement was only to give the negotiations a reasonable period of extra time).

What characterises these phenomena is that with regard to their origin, the intention of parties, their relation to existing legal rules and their enforcement, they come closer to the concept of convention than to legally binding agreements (chapter 4, paragraph 3). These agreements arguably lack a legal basis, which however does not in any way prevent the creation of a conventional agreement. The parties to the agreements do not intend to create a legally binding agreement, which can be deduced from various factors. Moreover, a reading of these agreements as conventional agreements provides a better understanding of their relation to the Treaty rules and to the ‘rules of change’ of the legal order. Finally, the European Court of Justice has taken a hands-off approach towards these agreements, leaving sanctions of a political nature as the alternative.

In comparison, the concept of soft law, which is equally used for not legally binding agreements, is of limited use in understanding these phenomena. This is because soft law in its dominant use refers to instruments that, different from constitutional conventions, deal with the exercise of discretionary executive powers towards individuals and in that context produce indirect legal effects through principles or judicial interpretation (chapter 4, paragraph 2.1). It belongs to the administrative rather than the constitutional sphere.

Convention can thus be said to be situated in between political practice on the one hand and law on the other. This has several methodological consequences, which have been considered in detail in this book with regard to conventions based on practice and precedent (chapter 2). A study of law, practice and convention is a combined methodology. It does not stop at the legal rules, which alone can give a distorted picture of the constitution (chapter 2, paragraph 3.1). It also takes into account the application of these rules in political practice and adds a further step, which can illustrate that sometimes legal powers, when not used (in practice), are also not available (because of a conventional rule). This final step, which requires historical research of the perception of actors, is what differentiates the combined approach from an empirical political science approach (chapter 2, paragraph 3.2).

The history of the third reading powers of the Council in the early co-decision procedure (between the Treaty of Maastricht and the Treaty of Amsterdam) have been used to substantiate these methodological reflections and to illustrate how existing approaches in legal scholarship and political science fall short in their analysis. The disuse of these powers was not only a (negative) practice, but was prescribed by what can be best understood as a
social rule: the actors involved from the side of the Council perceived these powers as unavailable and not usable, not to be used (chapter 2, paragraph 4.3).

The existence of this convention prescribing the disuse of the Council’s third reading powers (a social rule) puts into perspective game theoretical analyses of the early co-decision procedure, which draw conclusions on the division of powers between Council and Parliament based on a mathematical analysis (through the formulation of social laws). It equally puts into perspective a legal analysis of the formal division of powers (chapter 2, paragraph 3.1.). Moreover, an analysis in terms of constitutional law, practice and convention offers a better understanding of the division of powers between institutions than historical institutionalist approaches, which often do not make a clear distinction between practice and convention (chapter 2, paragraph 3.2).

Conventions illustrate who has what power, how it is exercised and why. They create a structure of rules. In their combination with legal powers, these conventional rules lead to a more accurate picture of the balance of powers between the institutions of the European Union. The concept of actual powers, seen as the result of conventional rules on legal powers, reflects this more precise picture (chapter 2, paragraph 4.3.3). Actual powers can be legal powers limited by conventional obligations – as the third reading of the early co-decision procedure illustrates – but also legal powers complemented by conventional powers – as the decision-making in the multiannual budgetary procedure illustrates (chapter 5, paragraph 3.5).

2 Conventions and the relation between law and politics in the constitution of the European Union

Conventions offer relevant insights in the relation between law and politics in the constitution of the European Union. As politically binding rules resulting from (agreements concluded in) the application of legal rules, conventions can be seen as a product and even a part of the political constitution. A product, if the political constitution is only understood as an empirical construct; also a part of it if a broader concept of the political constitution is taken which also includes limitations of power in convention (chapter 5, paragraph 3.2).

Conventions express the autonomy and sometimes primacy of the political constitution in its relation to the legal constitution. This can be understood from the various ways in which the political constitution affects the legal constitution: conventions limit the discretion of actors in the exercise of legal powers, they create new powers and obligations supplementing the law, they transfer the exercise of legal powers from one institution to another, and they nullify the effects of law (chapter 5, paragraph 3.4). In all cases, the
political constitution successfully claims autonomy from the legal constitution in determining the behaviour of constitutional actors. The political constitution is also autonomous in the sense that conventional rules have no other ‘judges’ than the parties or subject to the rules themselves. Especially when the exercise of powers is transferred from one institution to another or the effects of law are nullified, the political constitution takes primacy over the legal constitution (chapter 5, paragraph 3.6).

Convention is an independent source of constitutionalisation of the European Union, as are formal Treaty amendment, the case law of the European Court of Justice and practice (chapter 5, paragraph 5.1). The characteristics of conventions as a source of constitutional development are highlighted if seen in the light of a number of relevant distinctions traditionally made in the analysis of constitutional change. These characteristics offer valuable insights in the process of constitutional change and constitutionalisation of the European Union and facilitate the evolutionary nature of this process.

One of these distinctions is that between rigid and flexible change. Whereas Treaty amendment is procedurally rigid, constitutional change through convention is relatively flexible, since it can affect the legal constitution in defiance of the rules of change of the legal system (chapter 5, paragraph 5.3). In general, the flexibility offered by conventions as a source of constitutional development can be opposed to a greater rigidity of a legal system. Conventions can be seen as a flexible way to respond to circumstances (e.g. the Interinstitutional Agreement on budgetary discipline as a response to the lack of budgetary discipline and the budgetary problems of the eighties of the last century) and to circumvent legal procedures and the formal role of parties involved (e.g. the creation of institutional rules by the Commission and Parliament in their Framework Agreement, without altering the Treaty, to which they lack the power).

Convention furthermore represents a source of autonomous constitutional change if seen in light of the two extremes of original change by the ‘pouvoir constituant’ the one hand and autonomous evolutionary change by the ‘pouvoir constitué’ on the other (chapter 5, paragraph 5.2).Convention is an autonomous of constitutional change, in the sense that it allows parties not decisive in the amendment procedure or judicial constitutionalisation, notably the European Parliament, to have a prominent role in bringing about constitutional change. This appears from the various steps through which – by convention – the European Parliament has increased the individual political responsibility of candidate Commissioners during the investiture (chapter 5, paragraph 4).

Finally, convention represents an accidental source of constitutional development as opposed to grand design (chapter 5, paragraph 5.4). Even though convention can be the result of a cautiously chosen strategy (e.g. the establishment of parliamentary committee hearings
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by Parliament in the Commission investiture – chapter 5, paragraph 2), this is in stark contrast
with the drafting of a constitution by a select number of legislators in a revolutionary context.

Constitutional conventions have generally strengthened the position of the two representative
pillars of the European Union, the European Parliament and the member states (chapter 5,
paragraph 5.5). The European Parliament has for example used convention to increase its
powers in the investiture of the Commission and in the most important legislative procedure
of the European Union. The member states have for example increased their powers through
the creation of the European Council and its powers in budgetary and legislative decision-
making as well as conventional rules about decision-making in the Council.

This trend offers support to the early analysis of Dicey, that conventions are intended
to secure the ultimate supremacy of the electorate. His is not the last word on the matter,
however. In fact, the relation between convention, authority and representation is a great
subject of further research.

3 Questions for future research

3.1 Whether the existence of conventions is a good thing

It has been the central objective of this book to study the role of convention in the
constitution of the European Union. No principled position has been taken and defended on
the question whether the existence of conventions is a good thing or whether they have done
good to the process of European integration. Answering these questions requires another
theoretical framework than the one provided in this book.

This does not mean that the question whether convention is a good thing is
considered to be without relevance. In fact, it can be argued that the existence and effect of
conventions on the constitution of the European Union argued for and illustrated in this book,
increase the relevance of the question. To conclude, let me point at some possible approaches
to such an ethical discussion.

In discussing the question whether the existence of constitutional conventions in the
constitution European Union is a good thing, one can distinguish between a general,
principled approach with regard to the role of political and judicial institutions and an
approach that evaluates every individual convention on the basis of its substance, for example
for its effect on the process of European integration.

3.1.1 Political versus legal constitutionalism
A general, principled discussion on the question whether the existence of constitutional conventions in the European Union is a good thing can benefit from the academic debate between advocates of legal and of political constitutionalism. In short, this is a principled or ideological discussion between advocates of a strong role of law and judicial review of constitutional rights as a limitation on the exercise of public powers (legal constitutionalism) as opposed to limits posed by the democratic process (political constitutionalism).

According to advocates of legal constitutionalism (closely related to liberal-legalism), the constitution ‘should be understood as founded upon law that is enforceable in the courts’ 1435 and ‘the judicial process is more reliable than the democratic process at identifying’ the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. 1436 Critics argue that it ‘conveys the belief that answers to all political disputes can ultimately be found in law’. 1437

By contrast, advocates of political constitutionalism (closely related to republicanism) argue that ‘it is inaccurate to present the constitution as a legal construct and also that it is undesirable’ 1438 and that ‘the juridification of constitutions has a number of drawbacks’. 1439 Instead the ‘democratic process is the constitution’ 1440 and this ‘democratic process is more legitimate and effective than the judicial process at resolving’ the disagreements about substantive outcomes in society. 1441 Political constitutionalism ‘tries to find political and parliamentary solutions to (…) problems, rather than legal or judicial ones’. 1442 Moreover, the practice of politics is capable of generating its own implicit standards of correctness 1443 and constitutions are living representations of politics that must strike a balance between change and continuity. 1444

How then is the existence of constitutional conventions seen from the viewpoint of either legal or political constitutionalism? This can be illustrated by contrasting the views of European Union law scholar Julio Bacquero Cruz and Canadian constitutionalist Andrew Heard.

1436 This is the interpretation of the claim of legal constitutionalism given by and disputed by Richard Bellamy in Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (Cambridge, Cambridge University Press 2007) p. 3.
1438 These are the views of Adam Tomkins as reported by Tom Hickman in: Hickman (2005) p. 986.
1443 These are the views of Martin Loughlin as reported by Tom Hickman in: Hickman (2005) p. 997.
1444 These are the views of Adam Tomkins as reported by Tom Hickman in: Hickman (2005) p. 1006.
Bacquero Cruz, in an argument that reflects the spirit of legal constitutionalism, is critical of an important role of convention in the constitution of the European Union. Why? Because conventions potentially undermine the rule of law.

Constitutional culture and the rule of law are too important for the European Union to let its constitutional law be drowned under ‘informal rules’ that belong to another world and faced with which the law’s hands are tied. There is no border dividing law and politics: they are just points of view applied to the same reality. The acceptance of an extra-legal political realm not subject to the rule of law would be a grave danger to the stability of any political community, and especially so for one like the European Union. Practice, informal norms and constitutional conventions may be useful to fill in constitutional gaps, to be sure, but they have to conform to express constitutional provisions and respect certain conditions.\footnote{Julio Baquero Cruz, “The Luxembourg Compromise from a Legal Perspective. Constitutional Convention, Legal History or Political Myth?”, in: Jean-Marie Palayret, Helen Wallace & Pascaline Winand (eds.), *Visions, Votes and Vetoes. The Empty Chair Crisis and the Luxembourg Compromise Forty Years On* (Brussels, P.I.E.-Peter Lang 2006) p. 274.}

In fact, the characteristics of constitutional conventions discussed in this book are hard to reconcile with the principled position of advocates of legal constitutionalism: they are enforced through the (threat of) political sanctions, they affect legal rules in defiance of the ‘rules of change’ of the legal order, they can nullify the effects of the law or transfer the exercise of powers from one institution to another. In short, they reflect the autonomy and primacy of the political over the legal constitution.

How different is the position defended by Canadian constitutional lawyer Andrew Heard, who argues that:

> If conventions become increasingly justiciable, there is some danger that the democratic quality of constitutional evolution might be eroded.\footnote{Andrew Heard, *Canadian Constitutional Conventions. The marriage of Law and Politics* (Toronto, Oxford University Press 1991) p. 3.}

Characteristics of the same constitutional conventions motivate the more positive approach of advocates of political constitutionalism towards their existence and their role in limiting public powers: they result from the political/democratic process and not from legal procedures, they function outside the legal realm and are not judicially enforceable.\footnote{See chapter 2, paragraph 4.1.}

### 3.1.2 Convention and the process of European integration

The question whether the existence of constitutional conventions in the European Union is a good thing can alternatively be discussed from a different ideological perspective, which
focuses on the effect that an individual convention has on the process of European integration. In this approach the evaluation of an individual conventional rule, and the effect it has on the division of powers, will depend on the ideological position taken. In this approach there is an individual evaluation of each conventional rule on the basis of its substance, in contrast to the general, principled approach of either legal or political constitutionalism.

In this discussion it seems that something is to be gained from the existence of constitutional conventions in the European Union for both advocates and opponents of (further) integration of the European Union (chapter 5, paragraph 5.4). On the one hand it can be said that constitutional conventions have led to a strengthening of the powers of supranational institutions, especially but not only the European Parliament. This has been extensively illustrated by a number of conventions discussed in this book, such as the conventional obligation for candidate Commissioners to appear before a parliamentary committee as part of the investiture procedure (chapter 5). This conventional rule, but also the Framework Agreement between Commission and Parliament discussed in chapter 4, has increased the political control of the European Parliament on the Commission, and, it can be held, has also led to an increased legitimacy of the Commission. Furthermore, in chapter 2 it was seen that as a consequence of the conventional rule prescribing the disuse of the Council’s third reading powers in the co-decision procedure, the actual division of powers in the final phase of co-decision was more beneficial to the European Parliament than the formal legal division of powers.

At the same time it was seen that constitutional conventions have led to a strengthening of the powers of intergovernmental institutions and bodies, like the Council, the European Council, and of the individual member states. Thus, chapter 3 has shown that individual member states under circumstances have had a conventional ‘veto power’ under qualified majority decision-making in the Council and that there is a conventional rule prescribing that the Presidency takes into account the interests of member states particularly affected by a decision under qualified majority voting. Chapters 4 and 5 have illustrated the dominance by the European Council of the decision on the limitations to multi-annual expenditure in the European Union through the financial perspectives, to which other institutions (Parliament, Council and Commission) commit themselves.

3.2 On convention, representation, authority and legitimacy

Is representation a condition for increasing an institution’s powers through convention? Does the representative character of an institution itself increase through the establishment of
conventional rules, increasing the control over and accountability of other institutions? Is convention necessarily democratic? What role can conventions play in creating legitimacy of a constitution? What is the relationship between convention and political authority? If convention can increase the authority of political institutions, can it also establish constitutional authority?¹⁴⁴⁸

A general trend has been discerned in this book of convention strengthening the position of the two representative pillars of the European Union, the European Parliament and the member states. Fundamental questions remain that have not been discussed and can be subject of future research on the basis of this book.

It is impossible to understand the constitution of the European Union and impossible reasonably to discuss it without paying due attention to that distinction category of rules which in this book has been discussed as constitutional convention.

¹⁴⁴⁸ Note that Maduro has recently argued while the European Union has normative authority (supremacy of rules) and political authority (meaning that it has the autonomy to define the forms and goals of political action), it does not have – and should not assume – this constitutional authority (that is, the power of a polity to define its own destiny). Miguel Poiares Maduro, ‘The importance of being called a constitution: Constitutional authority and the authority of constitutionalism’, *International Journal of Constitutional Law* (2005) p. 332-356.