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## INFORMATION NOTE

### Some Basic Information on Constitutional Conventions

#### 1. Nature of Constitutional Conventions

1.1 Conventions as a source of constitutional rules have been widely acknowledged. Regardless of whether a country possesses an unwritten<sup>1</sup> or a written constitution, constitutional conventions usually play an important role in regulating constitutional relationships among different branches of government.

1.2 A common definition of constitutional conventions is: "*By convention is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution.*"<sup>2</sup>

#### 2. Difference between Law and Constitutional Conventions

2.1 Law and constitutional conventions are closely related. Constitutional conventions presuppose the existence of a legal framework, and do not exist in a legal vacuum. For example, in the UK, the constitutional conventions of forming a Cabinet presuppose the laws relating to the Queen's royal prerogative, the office and powers of Ministers, and the composition of Parliament.<sup>3</sup>

2.2 A difference between law and constitutional conventions is that laws are enforceable by the courts, but constitutional conventions are not enforced by the courts. If there is a conflict between constitutional conventions and law, the courts must enforce the law. In some countries, such as the United Kingdom (UK) and Canada, the courts acknowledge the existence of constitutional conventions as aids to judicial interpretation.<sup>4</sup> Academics consider that such acknowledgement may at times appear to be similar to enforcement.<sup>5</sup>

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<sup>1</sup> The United Kingdom is a typical example of a country which has an unwritten constitution. For detailed discussion on constitutional conventions in the United Kingdom, please refer to Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Oxford: Oxford University Press, 1984 and O. Hood Phillips and Jackson, *Constitutional and Administrative Law*, 8th ed., London: Sweet & Maxwell, 2001, Chapter 7.

<sup>2</sup> Kenneth Wheare, *Modern Constitutions*, 1951, p.179, quoted in Marshall, *Constitutional Conventions*, p. 7.

<sup>3</sup> For a detailed discussion on these legal matters, please refer to Chau Pak-kwan and Cheung Wai-lam, *Process of Appointment of Senior Members of Government in Selected Countries*, HK: Legislative Council Secretariat, 2002, Part 2.

<sup>4</sup> For relevant cases, see *Att.-Gen. v Jonathan Cape Ltd* [1976] Q. B. 752 and *RE Amendment of the Constitution of Canada* [1983] A. C. 394, HL.

<sup>5</sup> For an example, see John F. McEldowney, *Public Law*, 2nd ed., London: Sweet & Maxwell, 1998, p. 113.

### 3. Functions of Constitutional Conventions

3.1 First, as constitutional conventions can easily be adapted to new circumstances arising, they are therefore frequently used as a means of bringing about constitutional development, provided that those constitutional conventions do not contravene the existing laws.<sup>6</sup> A flexible way to make constitutional changes is through developing and modifying constitutional conventions. This is especially applicable to a country which does not have a written constitution. For example, since the late 1970s, it has become apparent that a UK government need not resign merely because it suffers a major defeat in an important issue (such as major legislative measures or policy proposals) in the House of Commons. The current view is that a government can always feel entitled to assume the confidence of Parliament in its continued existence, notwithstanding any setbacks such as defeats or significant rebellions in the division lobbies.<sup>7</sup> The existing convention is that a formal vote of no confidence is needed for a UK government to resign.

3.2 Secondly, constitutional conventions can be used to fill in the gaps within the legal structure of a government. In the case of unwritten constitutions, constitutional conventions are essential to provide rules for a constitutional government. In the UK, there is no law requiring that a Prime Minister be appointed, and the office of Prime Minister is a creation of constitutional conventions. Moreover, as written constitutions are often brief and concise, there is always a need for additional rules to be developed to facilitate the implementation of constitutions. In the United States, constitutional conventions have been developed on the method of nominating presidential candidates and the President's choice of a Cabinet.<sup>8</sup>

### 4. Sources of Constitutional Conventions

4.1 Many constitutional conventions are a result of traditional practices. In the UK, many constitutional conventions came from the formulation of political practices in the 18th century and towards the end of the 19th century.

4.2 Constitutional conventions can be established through a process of unbroken practice. In the UK, a sovereign has not refused assent to a bill since Queen Anne refused her assent to the *Scottish Militia Bill* in 1707. The existing constitutional convention is that the Queen must assent to every bill passed by the Houses of Parliament.

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<sup>6</sup> Constitutional development could also be achieved through constitutional amendments.

<sup>7</sup> Please see House of Commons Library, *Confidence Motions*, Research Paper 95/19, February 1995, p. 13.

<sup>8</sup> Please see Roy Pierce, *Choosing the Chief: President Election in France and the United States*, Ann Arbor : the University of Michigan Press, 1995 and Chau Pak-kwan and Cheung Wai-lam, *Process of Appointment of Senior Members of Government in Selected Countries*, Part 3.

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4.3 Constitutional conventions can be created by *mutual agreements* of concerned parties, and precedents are sometimes unnecessary.<sup>9</sup> In March 1997, both Houses in the UK passed resolutions which set out the principles that should govern the conduct of Ministers in relation to accounting to Parliament for the policies, decisions and actions of departments and agencies.<sup>10</sup> In July 1997, the Prime Minister published the new *Ministerial Code*<sup>11</sup> which set out the detailed guidance for Ministers' conducts. The parliamentary resolutions were formally incorporated in the *Ministerial Code*. Under the new *Ministerial Code*, inter alia, a new constitutional convention is created — Ministers who knowingly mislead Parliament will be expected to offer their resignations to the Prime Minister. (Section 1(iii), the *Ministerial Code*.)

## 5. When do Constitutional Conventions Become Established?

5.1 Usually, it is difficult to know precisely when or how constitutional conventions come into existence except for those which are created by explicit agreements. A constitutional convention is known to be established when there is a general acceptance of it as obligatory and when it is respected by the people or institutions it supposedly governs. The constitutional convention then becomes part of a formal structure of rules which is preserved and upheld.

## 6. Codification of Constitutional Conventions

6.1 Constitutional conventions are capable of being formulated in statute and they have been incorporated in various Commonwealth constitutions.<sup>12</sup>

6.2 In the UK, the *Scotland Act 1998* provides for the establishment of the Scottish Parliament and the Scottish Executive. The Act can be regarded as the formalization of recognized UK parliamentary conventions and practices. Under the Act, the First Minister may, with the approval of the Queen, appoint Scottish Ministers and Junior Scottish Ministers from members of the Scottish Parliament. Also, a Minister may be removed from office by the First Minister. A Minister may at any time resign and shall do so if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of Parliament.

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<sup>9</sup> Please see Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law*, 7th ed., London: Penguin Books, 1994, p. 43 and O. Hood Phillips and Jackson, *Constitutional and Administrative Law*, 8th ed., London: Sweet & Maxwell, 2001, p. 142.

<sup>10</sup> In the House of Commons, the resolution was carried on 19 March 1997, and a similar resolution was carried in the House of Lords on 20 March 1997.

<sup>11</sup> The document is available at <http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm>.

<sup>12</sup> Such as in Malaysia and Singapore.

6.3 In addition, the *Scotland Act 1998* provides for a formal involvement of the Scottish Parliament in ministerial appointments.<sup>13</sup> The First Minister shall not seek approval for any such appointment without the agreement of the Scottish Parliament.

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<sup>13</sup> For details, please refer to Delegation of the Panel on Constitutional Affairs, *Report on Duty visit to Study the Systems of Executive Accountability in the United Kingdom, France and Germany*, 13-24 June 2001.

**References**

1. Chau Pak-kwan and Cheung Wai-lam. *Process of Appointment of Senior Members of Government in Selected Countries*, HK: Legislative Council Secretariat, 2002.
2. de Smith, Stanley & Brazier, Rodney. *Constitutional and Administrative Law*, 7th ed., London: Penguin Books, 1994.
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