

Chapter 2 Constitutional and statutory requirements relating to the motion to censure Dr Hon CHENG Chung-tai

2.1 According to the Schedule to the censure motion, the conduct of Dr CHENG inverting the mock-ups of the national flag and regional flag placed on the desks of Democratic Alliance for the Betterment and Progress of Hong Kong (“DAB”)⁸ Members at the Council meeting of 19 October 2016 (“the said Council meeting”) was in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016 under BL 104 and the Oaths and Declarations Ordinance (Cap. 11); and constitutes misbehaviour as he openly and deliberately humiliated the national flag and regional flag in his capacity as a Member of LegCo. This Chapter highlights the constitutional and statutory requirements for oath-taking by Members as well as the use and protection of the national flag and regional flag, which are relevant to IC’s investigation.

Constitutional and statutory requirements for oath-taking

Oath-taking

2.2 BL 104 provides that:

“[w]hen assuming office ... members ... of the Legislative Council ... must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”

2.3 The meaning of BL 104 is set out in paragraphs 1 to 3 of the Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress (“the Interpretation”) (issued on 7 November 2016). According to the Interpretation, oath taking is the legal prerequisite and required procedure for public officers specified in BL 104 to assume office. The oath taken under BL 104 is a legal pledge made to the People’s Republic of China (“PRC”) and its

⁸ As mentioned in Chapter 3 of this Report, not only the mock-ups of the national flag and regional flag placed by DAB Members were inverted by Dr CHENG at the said Council meeting. The mock-ups of the national flag and regional flag placed by some other Members were also inverted by him.

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HKSAR and is legally binding. The oath taking must comply with the legal requirements in respect of its form and content. An oath taker must take the oath sincerely and solemnly. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in BL 104. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law.⁹ The courts in HKSAR have considered the Interpretation in relevant court judgments, and have pointed out that the Interpretation as to the true and proper meaning of BL 104 is binding on all the courts in HKSAR.¹⁰

2.4 The form of LegCo Oath required to be taken by Members is set out in Part IV of Schedule 2 to the Oaths and Declarations Ordinance, which is reproduced below:

“I swear that, being a member of the Legislative Council of the Hong Kong Special Administrative Region of the People’s Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity.”

2.5 Under section 7 of the Oaths and Declarations Ordinance, a member-elect may opt to make an affirmation instead of taking an oath

⁹ L.N. 169 of 2016.

¹⁰ Paragraphs 20 and 22 of the Court of First Instance’s judgment in *Chief Executive of the Hong Kong Special Administrative Region and Another v The President of the Legislative Council and Another* (HCAL 223, 225-226/2016), *Chief Executive of the Hong Kong Special Administrative Region and Another v Clerk to the Legislative Council and Another* (HCAL 224/2016), *Secretary for Justice v YIU Chung Yim* (HCMP 3378/2016), *Secretary for Justice v Nathan LAW Kwun Chung* (HCMP 3379/2016), *Secretary for Justice v LAU Siu Lai* (HCMP 3381/2016), and *Secretary for Justice v LEUNG Kwok Hung* (HCMP 3382/2016) (14 July 2017). See also paragraph 35 of the reasons for determination of the Appeal Committee of the Court of Final Appeal in *Chief Executive of the Hong Kong Special Administrative Region and Another v The President of the Legislative Council and Others* (FAMV 7-10/2017) (1 September 2017) .

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for the purpose of the LegCo Oath. The form and content of the affirmation shall be the same as the prescribed LegCo Oath, save that an affirmation shall commence with “I, [name], solemnly, sincerely, and truly declare and affirm”. The words “solemnly, sincerely” are not defined in the Oaths and Declarations Ordinance.

“Breach of oath” and “misbehaviour” under BL 79(7)

2.6 BL 79(7) provides that the President shall declare that a member of LegCo is no longer qualified for the office when he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of LegCo present.

2.7 The phrase “breach of oath” is not defined in BL, the Oaths and Declarations Ordinance or RoP. No judicial decisions have been identified on the types of conduct which amount to breach of oath in a context similar to that of the censure motion. There were a number of cases relating to the taking of the LegCo Oath by Members but such cases mainly concerned the validity of the oath taken by Members instead of breach of oath.¹¹ The term “misbehaviour” is also not defined in BL or RoP. No judicial authorities have been identified on the meaning of “misbehaviour” in a context similar to that of the censure motion. Nor is there any record of discussion by the Basic Law Drafting Committee and the Basic Law Consultative Committee about the meaning or scope of “misbehaviour” referred to in BL 79(7).

2.8 What behaviour should be regarded as falling within the meaning of the two terms, namely “breach of oath” and “misbehaviour”, was considered by the Committee on Rules of Procedure (“CRoP”) in 1999. CRoP concluded then that it would be more appropriate for the Council of the day to make a decision on the kind of behaviour which would be regarded as “misbehaviour” or “breach of oath” leading to the disqualification of a Member from the office under BL 79(7).¹² The definition of “misbehaviour” was also considered by the first investigation committee. In its view, it was by no means easy to formulate clear and explicit criteria for defining “misbehaviour”. The first investigation committee further observed that BL 79(7) has not explicitly

¹¹ The relevant cases are:

- (a) *LEUNG Kwok Hung v Clerk to the Legislative Council* (HCAL 112/2004); and
- (b) *Chief Executive of the Hong Kong Special Administrative Region and Another v The President of the Legislative Council and Others* (FAMV 7-10/2017) (1 September 2017) (on appeal from CACV 224-227/2016).

¹² Paragraph 2.49 of the Progress Report of CRoP for the period July 1998 to April 1999.

stipulated that “misbehaviour” should cover only the conduct of Members in the discharge of their duties as Members. However, the first investigation committee considered that the mechanism in question should not be applicable to conduct purely related to a Member’s personal or private life, unless such conduct seriously affects the reputation of LegCo as a whole.¹³

2.9 IC has attempted to study cases in overseas jurisdictions where members of legislatures had been found to be in breach of their oath by desecrating the national flag, but no such cases were found up to the publication of this Report.

Regulation of the use and protection of the national flag and regional flag

2.10 In Hong Kong, the use and protection of the national flag and regional flag are regulated by the respective Ordinances, i.e. NFO and RFO.

NFO

2.11 Under section 2 of NFO, “national flag” means the national flag of PRC adopted by resolution of the First Plenary Session of the Chinese People’s Political Consultative Conference on 27 September 1949. Section 4 provides that a national flag which is damaged, defiled, faded or substandard must not be displayed or used. Section 7 provides that:

*“A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.”*¹⁴

2.12 Schedule 1 to NFO sets out the specifications for the national flag, which include the measurement in common use for the national flag.¹⁵

¹³ Paragraph 5.7 of the report of the first investigation committee.

¹⁴ A level 5 fine stands at HK\$50,000 (Schedule 8 to the Criminal Procedure Ordinance (Cap. 221)).

¹⁵ Paragraph (3) of Schedule 1 to NFO provides for the following measurement in common use for the national flag from which people from various circles may choose at their discretion:

- a. 288 cm in length, 192 cm in height;
- b. 240 cm in length, 160 cm in height;
- c. 192 cm in length, 128 cm in height;
- d. 144 cm in length, 96 cm in height; and
- e. 96 cm in length, 64 cm in height.

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Section 8 of NFO provides that a copy of the national flag that is not an exact copy but that so closely resembles the national flag as to lead to the belief that the copy in question is the national flag is taken to be the national flag for the purposes of NFO. It is noted that no definition of “copy” or “closely resemble” is provided in NFO.

2.13 Schedule 3 to NFO provides for, among others, the priority of the national flag. In particular, when the national flag is displayed, it shall be placed in a prominent position. The national flag, when displayed with another flag or flags, shall be at the centre, above the other flag or flags, or in a position of prominence.

RFO

2.14 The regulation of the use and protection of the regional flag is similar to those of the national flag. Under section 2 of RFO, “regional flag” means the regional flag of HKSAR endorsed at the Fourth Plenum of the Preparatory Committee of HKSAR on 10 August 1996. Section 4 provides that a regional flag which is damaged, defiled, faded or substandard must not be displayed or used. Section 7 provides that:

“A person who desecrates the regional flag or regional emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable –

- (a) on conviction on indictment to a fine at level 5 and to imprisonment for 3 years; and*
- (b) on summary conviction to a fine at level 3 and to imprisonment for 1 year.”*

2.15 Schedule 1 to RFO sets out the specifications for the regional flag. There are eight different standard sizes, including the measurement of the regional flag used as a desk flag the length of which is 15 cm and the height 10 cm. If regional flags of non-standard sizes are required to meet special needs, they shall be of a scaled-up or a scaled-down size. Similar to section 8 of NFO, section 8 of RFO provides that a copy of the regional flag that is not an exact copy but that so closely resembles the regional flag as to lead to the belief that the copy in question is the regional flag is taken to be the regional flag for the purposes of RFO. Like NFO, RFO does not provide for a definition of “copy” or “closely resemble”.

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2.16 Schedule 3 to RFO provides for the arrangements for the display and use of the regional flag to safeguard the dignity of the regional flag. It also provides that the regional flag is the symbol of HKSAR, and each and every Hong Kong resident and organization should respect and cherish the regional flag. In HKSAR, whenever the national flag is flown together with the regional flag, the national flag is to occupy a more prominent position. When the national flag is flown alongside the regional flag, the national flag is to be on the right and the regional flag on the left. According to the Administration's relevant stipulations, when the national flag and regional flag are displayed at the same time or displayed side by side, the regional flag shall be smaller than the national flag, with the national flag on the right and the regional flag on the left.¹⁶

2.17 To facilitate its understanding of the subject matter of the investigation, IC has also studied the protection of national flags in some overseas jurisdictions.¹⁷

Relevant court cases

2.18 Section 7 of NFO and of RFO set out five criminal acts constituting desecration of the national flag and regional flag, i.e. publicly and wilfully (公開及故意) (a) burning (焚燒), (b) mutilating (毀損), (c) scrawling on (塗劃), (d) defiling (玷污) and (e) trampling on (踐踏) such flags, but none of these acts is defined in NFO or RFO. Nevertheless, there were a number of judicial decisions on cases concerning desecrating those flags in Hong Kong, namely *HKSAR v NG Kung Siu and LEE Kin Yun* (FACC 4/1999, on appeal from HCMA 563/1998), *HKSAR v KOO Sze Yiu and MA Wan Ki* (HCMA 482/2013, on appeal from ESCC 918/2013) and *HKSAR v KOO Sze Yiu* (HCMA 185/2013, on appeal from ESCC 368/2013). A summary of the facts and sentences in respect of those cases are in **Appendix 2.2**.

¹⁶ Paragraph 3(2) of the Stipulations for the Display and Use of the National Flag and National Emblem and the Regional Flag and Regional Emblem made by the Chief Executive ("CE") under section 3(2) of NFO and section 3(1) of RFO. Both section 10 of NFO and section 9 of RFO provide that a stipulation made by CE under NFO or RFO is not subsidiary legislation.

¹⁷ Paragraphs 16 to 22 of the information paper prepared by the Legal Service Division of the LegCo Secretariat on relevant legal issues relating to the motion to censure Dr Hon CHENG Chung-tai (**Appendix 2.1**).

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2.19 As mentioned in paragraph 2.1, one of the allegations in the Schedule to the censure motion is that Dr CHENG openly and deliberately humiliated the national flag and regional flag in his capacity as a Member of LegCo, which constituted misbehaviour. IC found the court judgments in the above cases useful for its consideration of the matter. IC also considered the Reasons for Verdict and Sentence of the criminal case against Dr CHENG in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017). The relevant issues considered by the courts are highlighted below.

HKSAR v NG Kung Siu and LEE Kin Yun

2.20 The meaning of desecration of the national flag and regional flag by defiling them in section 7 of NFO and of RFO was considered by the Court of Final Appeal (“CFA”) in *HKSAR v NG Kung Siu and LEE Kin Yun*.¹⁸ The case concerned two Defendants carrying in their hands and waving in the air along the route of a public procession what appeared to be a defaced national flag and a defaced regional flag, and tying the two flags to some railings outside the Central Government Offices on 1 January 1998. The two Defendants were charged for the offence of desecrating the national flag and regional flag by publicly and wilfully defiling them, contrary to section 7 of NFO and of RFO.

2.21 In its judgment on the case of *HKSAR v NG Kung Siu and LEE Kin Yun*, CFA emphasized the symbolic importance of the national flag and regional flag:

“The national flag is the symbol of the People’s Republic of China. It is the symbol of the State and the sovereignty of the State. It represents the People’s Republic of China, with her dignity, unity and territorial integrity.

The regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People’s Republic of China under the principle of ‘one country, two systems’...

The intrinsic importance of the national flag and the regional flag to the HKSAR as such unique symbols is demonstrated by the fact that at the historic moment on the stroke of midnight on 1 July 1997, the handover ceremony in Hong Kong to mark

¹⁸ (1999) 2 HKCFAR 442 (FACC 4/1999, 15 December 1999).

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the People's Republic of China's resumption of the exercise of sovereignty over Hong Kong began by the raising of the national flag and the regional flag.”¹⁹

2.22 As to what amounts to desecration of the national flag and regional flag by defiling them, CFA held that:

“The ordinary meaning of ‘defiling’ plainly includes dishonouring. By carrying and waving the defaced flags during the public procession and then tying them to some railings at the end of the procession, the respondents were clearly dishonouring the flags. These acts clearly amount to desecration by defiling.”²⁰

2.23 Taking the national flag and regional flag as symbols, CFA viewed flag desecration as symbolic or non-verbal expression:

“[F]lag desecration is symbolic expression or non-verbal expression. A person desecrating a national flag as a means of expression would usually be expressing a message of protest. But the message he seeks to convey may not be clear. The message may be one of hatred or opposition directed to the nation. Or it may be one of protest against the ruling government. Or the person concerned may be protesting against a current policy of the government. Or some other message may be intended. One has to consider the surrounding circumstances of the flag desecration in question to ascertain the message which is sought to be communicated.”²¹

2.24 CFA interpreted “desecration” in flag desecration in a broad sense of the word, i.e. even putting words of praise on the national flag or regional flag would constitute flag desecration:

“The prohibition of desecration of the national and regional flags by the statutory provisions in question is not a wide restriction of the freedom of expression. It is a limited one. It bans one mode of expressing whatever the message the

¹⁹ Paragraphs 3, 4 and 5 of the judgment in *HKSAR v NG Kung Siu and LEE Kin Yun* (FACC 4/1999).

²⁰ Paragraph 36 of the judgment in *HKSAR v NG Kung Siu and LEE Kin Yun* (FACC 4/1999).

²¹ Paragraph 43 of the judgment in *HKSAR v NG Kung Siu and LEE Kin Yun* (FACC 4/1999).

person concerned may wish to express, that is the mode of desecrating the flags. It does not interfere with the person's freedom to express the same message by other modes. Further, it may well be that scrawling words of praise on the flags (as opposed to words of protest which is usually the message sought to be conveyed) would constitute offences within section 7 of both Ordinances, namely, that of desecrating the flag by scrawling on the same. If this be right, then it would mean that the prohibition not only bans expression by this mode of a message of protest, but also other messages including a message of praise. But a law seeking to protect the dignity of the flag in question as a symbol, in order to be effective, must protect it against desecration generally.”²²

HKSAR v KOO Sze Yiu and MA Wan Ki

2.25 The case of *HKSAR v KOO Sze Yiu and MA Wan Ki*²³ concerned two Defendants setting fire to a regional flag with a lighter or burning newspaper. They were charged with the offence of attempting to desecrate the regional flag, contrary to, among others, section 7 of RFO, and were convicted. The Court of First Instance (“CFI”) of the High Court dismissed the appeals against conviction by the Defendants.²⁴ In this case, CFI followed the line of thinking of CFA as set out in paragraph 2.24 above:

“According to the analysis made by Li CJ in Ng Kung Siu, the word ‘desecrate’ does not bear any specific or one-way meaning. On a literal interpretation, even the act of putting words of praise on the national/regional flag would be an offence for it would constitute ‘scrawling on’ the flag. Therefore, be it section 7 of the National Flag Ordinance (for short) or section 7 of the Regional Flag Ordinance, its purpose is simply to preserve the dignity of the national/regional flag against desecration in the broad sense of the word.”²⁵

²² Paragraph 44 of the judgment in *HKSAR v NG Kung Siu and LEE Kin Yun* (FACC 4/1999).

²³ [2014] 4 HKLRD 565 (HCMA 482/2013, 27 March 2014).

²⁴ In respect of this case, the Appeal Committee of CFA refused to grant leave to the Defendants to appeal to CFA in (2014) 17 HKCFAR 811 (FAMC 40/2014, 10 November 2014).

²⁵ Paragraph 17 of the judgment in *HKSAR v KOO Sze Yiu and MA Wan Ki* (HCMA 482/2013).

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HKSAR v CHENG Chung-tai

2.26 Whether Dr CHENG's act of inverting mock-ups of the national flag and regional flag at the said Council meeting amounted to desecration of such flags by defiling them was the main issue dealt with by the Magistrate Court, which handed down its reasons for verdict and sentence²⁶ on 29 September 2017. In that case, Dr CHENG as the Defendant was charged with two counts of desecrating the national flag and regional flag by publicly and wilfully defiling them, contrary to section 7 of NFO and of RFO.

2.27 During the trial, the Defence did not dispute the facts of the case that the Defendant had inverted the national flags and regional flags erected on the desks of some Members at the said Council meeting. The points of contention in the case were: (a) the legal meaning of "defiling" (玷污) in section 7 of NFO and of RFO; and (b) whether the Defendant's act constituted desecration of the national flag and regional flag by defiling them.²⁷

2.28 The Magistrate Court did not accept the Defence's argument that in NFO and RFO, same as "defiled" (污損) in section 4, "defiling" (玷污) in section 7 must refer to an act which substantially soils a flag or inflicts physical damage on a flag. Citing the judgment of CFA in *HKSAR v NG Kung Siu and LEE Kin Yun*, the Magistrate Court pointed out the different legislative intents of sections 4 and 7 in that the purpose of section 4 is to guide people who mean to do reverence to the national flags and regional flags and emblems, while, by complete contrast, that section 7 is to protect the national flags and regional flags and emblems from people who mean to desecrate them.²⁸ The Magistrate Court held that "defiled" (污損) in section 4 was not equivalent to "defiling" (玷污) in section 7. Following the judgment of CFA in *HKSAR v NG Kung Siu and LEE Kin Yun*, the Magistrate Court ruled that "defiling" (玷污) encompassed "dishonouring" (玷辱). In other words, acts of physical dishonour of flags were not limited to soiling or damaging materials. Whether an act

²⁶ Transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4).

²⁷ Rows R to S on page 1 of the transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4).

²⁸ Paragraph 76 of the judgment in *HKSAR v NG Kung Siu and LEE Kin Yun* (FACC 4/1999), and rows H to K on page 2 of the transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4).

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constituted “defiling” (玷污) shall depend on the actual circumstances and conditions under which that particular act was committed.²⁹

2.29 The Magistrate Court ruled that the Defendant’s act constituted desecration of the national flag and regional flag:

“下一個問題係倒插國旗與及區旗是否以玷污嘅方式侮辱有關嘅旗幟。... 有關嘅旗幟其實係有一支白色嘅旗桿，當旗桿插在杯座上，旗幟內嘅圖案就能以符合法例嘅規格方式展示，即係國旗入面嘅五星圖案會展示喺旗幟左上方，區旗嘅紫荊花圖案亦都會正面顯示出嚟，任何正常及合理嘅人都必定明白將一面國旗或區旗倒插必定會破壞有關旗幟嘅尊嚴，當被告人把國旗及區旗倒插在杯座上，使旗幟塞在杯座，旗桿伸出杯座，任何正常及合理嘅人都會必然認同被告是以受辱嘅方式展示旗幟。因此，本席裁定被告在案發時於會議廳倒插國旗及區旗是以玷污嘅方式侮辱國旗及區旗，被告亦肯定明白呢一點。無論被告當其時是否小心翼翼咁倒插國旗及區旗，又或者佢最終嘅目的只係希望藉此將離席議員吸引返回會議廳，其實與他是否干犯侮辱國旗及區旗嘅罪行並無關係。”³⁰

²⁹ Rows P to S on page 3 of the transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4).

³⁰ Row S on page 3 to row D on page 4 of the transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4); English translation: “The next question is whether the act of inverting a national flag and a regional flag amounts to desecrating those flags by defiling them. ... The flags in question actually came with a white pole. As long as the pole was placed in a glass holder, the design of the flag could be displayed in accordance with the specifications set out in the legislation, i.e. the design of five stars was displayed on the upper left of the national flag, and the bauhinia design was also displayed on the front of the regional flag. Any normal and reasonable person should understand that inverting a national flag or a regional flag certainly tarnishes the dignity of the flag. When the Defendant inverted the national flags and regional flags in the glass holders, resulting in the flags being stuffed inside the glass holders and their poles stretching out of the holders, any normal and reasonable person would definitely agree that the Defendant had caused the flags to be displayed in an insulting way. Therefore, I hold that the Defendant has, by inverting the national flags and regional flags in the Chamber at the material time, desecrated those flags by defiling them. The Defendant certainly understands this too. Whether the Defendant had inverted the national flags and regional flags with great care, or whether his aim of doing this was just to attract Members who had left their seats to return to the Chamber, is not relevant to whether he had committed the offence of desecrating the national flag and regional flag.”

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2.30 The Magistrate Court considered that the copies of the national flags and regional flags inverted by the Defendant closely resembled the national flag and regional flag as to lead to the belief that the copies in question were the national flag and regional flag for the purposes of NFO and RFO:

“... 有關嘅旗幟係咪國旗同埋區旗，涉案嘅國旗及區旗並不完全符合法例嘅規格，但係根據有關嘅法例嘅第 8 條只要其相似程度足以使人相信它是國旗或區旗，有關嘅複製本已可視為國旗或區旗，由證物P7--P6 及P7 可以見到，無論係旗幟嘅顏色，長闊嘅比例，星形嘅圖案，就國旗而言喇，紫荊花形嘅圖案就區旗而言，與及圖案嘅位置，其相似程度肯定足以使人相信佢就係國旗或區旗。”³¹

2.31 The Magistrate Court also considered the Defendant’s act as a public and wilful act:

“顯而易見，公開就是公眾人士可以見到嘅意思，案發日約有三十名公眾人士在立法會的公眾席現場觀看會議過程，此外，公眾人士亦可以進入立法會網站觀看當日會議的錄像的網上直播，被告人兩次前往其他離席議員的座位桌前，將國旗及區旗倒插肯定是故意嘅行為，本席肯定案發日被告在會議廳內兩次公開及故意地倒插國旗及區旗。”³²

³¹ Rows D to F on page 4 of the transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4); English translation: “...On the question of whether the flags concerned were the national flag or regional flag, although the flags involved in the present case did not fully conform to the specifications under the legislation, a copy, according to section 8 of NFO and RFO, that so closely resembles the national flag or regional flag as to lead to the belief that it is the national flag or regional flag is taken to be the national flag or regional flag under sections 8 of the relevant Ordinances. As seen from exhibits P7—P6 and P7, the close resemblance they bore to the national flag in terms of colour, length/width ratio and the star shape design and to the regional flag in terms of the bauhinia shape design and the position of the design had definitely led to the belief that they were the national flag or regional flag.”

³² Rows G to I on page 4 of the transcript of the Reasons for Verdict and Sentence in *HKSAR v CHENG Chung Tai* (ESCC 1139/2017) (Appendix 1.4); English translation: “Apparently, “publicly” means exposing an item in such a manner that it may be readily seen by members of the public. On the material day, about 30 members of the public were on the spot observing the proceedings of the meeting in the public gallery of LegCo. Besides, members of the public could watch the live webcast of the meeting on that day by accessing the LegCo website. The Defendant walked twice to the seats of the Members who had left the meeting and inverted the national flags and regional flags on the desks. Such conduct definitely constituted a wilful act.

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2.32 The Magistrate Court found the Defendant guilty of the two charges and ordered that the Defendant be fined \$2,500 on each of the two charges. The time limit for Dr CHENG to appeal against the Magistrate Court's conviction and sentence has expired.

2.33 In conducting its investigation, IC has taken the above court judgments as important reference. Nevertheless, IC is fully aware that it itself is not a court and its function is not to investigate whether Dr CHENG's alleged misbehaviour violated the law or to adjudicate on the legal liability of Dr CHENG. Under RoP 73A(2), IC is responsible for establishing the facts stated in the censure motion and giving its views on whether or not the facts as established constitute grounds for the censure of Dr CHENG. It is incumbent upon IC to establish and consider the relevant facts and make its own views on whether Dr CHENG's alleged misbehaviour constitutes "breach of oath" and/or "misbehaviour" under BL 79(7) by taking into account the evidence and information obtained by IC, relevant provisions in BL and relevant legislation.

I am sure that on the material day, the Defendant publicly and wilfully inverted the national flags and regional flags twice in the Chamber."