

**Report of the Legislative Council Investigation Committee established under
Rule 49B(2A) of the Rules of Procedure in respect of the motion
to censure Dr Hon CHENG Chung-tai**

Executive Summary

1. At the Council meeting of 14 December 2016, Hon Paul TSE moved a motion under Rule 49B(1A) of the Rules of Procedure (“RoP”) to censure Dr Hon CHENG Chung-tai (“Dr CHENG”) under Article 79(7) of the Basic Law (“BL”) (“the censure motion”) for his conduct of inverting the mock-ups of the national flag of the People’s Republic of China (“PRC”) (“the national flag”) and the regional flag of the Hong Kong Special Administrative Region (“HKSAR”) of PRC (“the regional flag”) placed on the desks of some Members at the Council meeting of 19 October 2016 (“the said Council meeting”). The wording of the censure motion is set out in paragraph 1.3 of this Report. Upon the moving of the censure motion, Hon CHAN Chi-chuen moved without notice the motion under RoP 49B(2A) that no further action should be taken on the censure motion. As Mr CHAN’s motion was negatived, in accordance with RoP 49B(2A), the debate on the censure motion was adjourned and the matter stated in the censure motion was referred to the Investigation Committee (“IC”).

2. Under RoP 73A(2), IC shall be 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. IC’s membership, scope of investigation, work plan, Practice and Procedure as well as other important matters relating to the work of IC are set out in Chapter 1 of this Report. IC has also studied the constitutional and statutory requirements for oath-taking by Members as well as the use and protection of the national flag and regional flag, relevant court cases, and information and evidence relevant to the particulars of Dr CHENG’s misbehaviour stated in the Schedule to the censure motion, the details of which are respectively set out in Chapters 2 and 3 of this Report.

3. From 20 February 2017 to 9 March 2018, IC conducted a total of eight closed meetings, including two hearings held in camera to obtain evidence from seven witnesses.

Established facts

4. In Chapter 4 of this Report, IC considers that the following facts have been established based on the evidence obtained during its investigation:

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- (a) at the said Council meetings, the mock-ups of the national flag and regional flag placed on the desks of some Members may be taken as the national flag and regional flag in terms of colour, design and appearance. Accordingly, the mock-ups inverted by Dr CHENG at that meeting were taken to be the national flag and regional flag;
- (b) the purpose and manner of placing the national flags and regional flags by the Members concerned were to highlight the solemnity and pledge of taking oath to uphold BL and swear allegiance to HKSAR of PRC;
- (c) despite Dr Hon CHIANG Lai-wan (“Dr CHIANG”)’s repeated rebukes and the President’s requests for him to return to his seat, Dr CHENG continued to invert the national flags and regional flags placed on the desks of the Members concerned, and such acts were deliberate acts;
- (d) Dr CHENG persistently refused to leave the Chamber when ordered by the President to withdraw from the Council for leaving his seat at will and going to the seats of other Members to cause a disturbance; and
- (e) Dr CHENG openly and deliberately humiliated the national flag and regional flag in the capacity of a Legislative Council (“LegCo”) Member.

Two allegations in the censure motion

5. Regarding the established facts, IC needs to consider whether the following two allegations made in the censure motion are substantiated:

- (a) Dr CHENG’s relevant conduct was in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016 under BL 104 and the Oaths

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and Declarations Ordinance (Cap. 11) to uphold BL and swear allegiance to HKSAR of PRC; and

- (b) the aforesaid conduct constitutes “misbehaviour” under BL 79(7) as Dr CHENG openly and deliberately humiliated the national flags and regional flags in the capacity of a LegCo Member.

6. IC notes that neither “breach of oath” nor “misbehaviour” under BL 79(7) is defined in BL, the relevant legislation or RoP. In considering whether the two allegations are substantiated, IC needs to take into account the established facts, relevant constitutional and statutory requirements, relevant court cases and the degree of severity of Dr CHENG’s conduct. IC has also made reference to the Reasons for Verdict and Sentence handed down by the Eastern Magistrates’ Court in respect of the case of *HKSAR v CHENG Chung-tai*. However, IC understands that it itself is not a court but is established under RoP. It cannot merely rely on the court judgment when determining whether Dr CHENG’s conduct constitutes “breach of oath” and/or “misbehaviour” under BL 79(7).

Whether Dr CHENG’s conduct constitutes “breach of oath”

7. On the first allegation in the censure motion, i.e. Dr CHENG’s relevant conduct was in breach of the LegCo Oath, IC notes that in accordance with 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”), the oath taken under BL 104 is a legal pledge made by LegCo Members to PRC and its HKSAR. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. According to the Interpretation, in considering whether Dr CHENG’s relevant conduct constitutes a breach of the LegCo Oath, IC needs to consider whether his conduct was consistent with his pledges made under the LegCo Oath to PRC and its HKSAR. At the Council meeting of 12 October 2016, Dr CHENG took the LegCo Oath by which he pledged to: (a) uphold BL; and (b) bear allegiance to HKSAR of PRC.

8. IC notes that, as pointed out by the Court of Final Appeal in its judgment on the case of *HKSAR v NG Kung Siu and LEE Kin Yun*, the national flag represents PRC with her dignity, unity and territorial integrity,

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while the regional flag is the symbol of HKSAR as an inalienable part of PRC under the principle of “one country, two systems”. IC considers that the symbolic meanings represented by those flags are fundamental to the enactment of BL and the relationship between the Central Authorities and HKSAR under “one country, two systems”. Such meanings have clearly been reflected in BL and in the pledges enshrined in the LegCo Oath taken by Dr CHENG.

9. In IC’s view, Dr CHENG’s repeated, open and deliberate humiliation of those flags, despite repeated advices and warnings by Dr CHIANG and the President, would lead a reasonable person to come to the view that Dr CHENG was not willing or at least had no intention to recognize or respect the meanings represented by those flags. Dr CHENG’s conduct of humiliating those flags indicated that he did not manifest an intention to genuinely and faithfully accept and commit himself to honour the pledges of upholding BL and bearing allegiance to HKSAR of PRC. IC considers that the first allegation in the censure motion is substantiated, i.e. Dr CHENG’s conduct was in breach of the LegCo Oath taken by him.

Whether Dr CHENG’s conduct constitutes “misbehaviour”

10. On the second allegation in the censure motion, i.e. Dr CHENG’s relevant conduct constitutes “misbehaviour” under BL 79(7), IC notes that the “Advisory Guidelines on Matters of Ethics in relation to the Conduct of Members of the Legislative Council of the Hong Kong Special Administrative Region in their capacity as such” (“Advisory Guidelines”) clearly state that “a Member should ensure that his conduct must not be such as to bring discredit upon the Council”, and “should conduct himself in such a way as not to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member of the Council”.

11. IC considers that bringing serious discredit upon LegCo and acting contrary to the generally assumed standard of conduct expected of a LegCo Member should be the key elements constituting a Member’s “misbehaviour” under BL 79(7). In considering whether Dr CHENG’s relevant conduct entails the above key elements, IC notes that:

- (a) Dr CHENG inverted the national flags and regional flags not only once but twice, with the first round involving 21 flags displayed by 11 Members and

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the second round 16 flags displayed by eight Members;

- (b) Dr CHENG did so at an open meeting broadcast live on television and online amid the concern of some Members and the public about the solemnity and validity of the oath-taking by Members;
- (c) Dr CHENG continued to do so despite repeated advices and warnings by Dr CHIANG and the President;
- (d) up to the publication of this Report, Dr CHENG has not made a public apology for his conduct; and
- (e) Dr CHENG was convicted by the court on two counts of desecrating the national flag and regional flag by publicly and wilfully defiling them at the said Council meeting.

12. In view of the manner and circumstances in which Dr CHENG humiliated the national flag and regional flag, the message conveyed to the public by his conduct in his capacity as a LegCo Member as well as his criminal conviction for desecration of those flags, IC considers that such humiliation has undoubtedly indicated that he was disrespectful to PRC and its HKSAR and has thereby brought serious discredit on LegCo, contrary to the generally assumed standard of conduct expected of a LegCo Member. Dr CHENG's conduct of humiliating the national flag and regional flag was serious enough to amount to "misbehaviour" under BL 79(7). IC therefore considers that the second allegation in the censure motion is also substantiated.

Conclusion

13. IC considers that Dr CHENG's conduct of openly and deliberately humiliating the national flag and regional flag constitutes both "breach of oath" and "misbehaviour" under BL 79(7). IC condemns Dr CHENG's conduct, and comes to the unanimous view that the facts as established constitute grounds for the censure of Dr CHENG.