

立法會
Legislative Council

LC Paper No. CB(2)2054/13-14(07)

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Panel on Constitutional Affairs

**Information note prepared by the Legislative Council Secretariat
for the meeting on 21 July 2014**

**Disqualification of candidates with
unserved prison sentences and other related matters**

According to section 39(1)(b) of the Legislative Council ("LegCo") Ordinance ("LCO") (Cap. 542) (**Appendix I**), a person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person has, in Hong Kong or any other place, been sentenced to death or imprisonment and has not either –

- (a) served the sentence or undergone such other punishment as a competent authority may have been substituted for the sentence;
or
- (b) received a free pardon.

However, in two consolidated judicial review cases on the right of persons with unserved prison sentences to be qualified as candidates for LegCo elections¹, the Court of First Instance delivered oral and written judgment on 14 and 21 June 2012 respectively which has declared section 39(1)(b) of LCO unconstitutional. Members may refer to the judgment which is available at http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=82353&QS=%2B&TP=JU.


2. On 12 July 2012, the Administration announced its decision not to appeal against the judgment. The government press release in response to the Court's judgment is in **Appendix II**. Members are invited to note that the

¹ *Wong Hin Wai v Secretary for Justice (HCAL 51/2012) and Leung Kwok Hung v Secretary for Justice (HCAL 54/2012)*. In both cases, the applicants had been convicted by a court of law and sentenced to imprisonment. Both appealed against the conviction and sentence, and were granted bail pending appeal. They challenged the constitutionality of the disqualification provisions of section 39(1)(b)(i) and section 39(1)(d) of LCO by means of judicial review.

subject of disqualification of candidates with unserved prison sentences has not been discussed by the Panel before. Relevant press cuttings on the subject are attached in **Appendix III** for members' reference.

Council Business Division 2
Legislative Council Secretariat
17 July 2014

Appendix I**Contents of Section**

Chapter:	542 	Title:	Legislative Council Ordinance	Gazette Number:	2 of 2011; 12 of 2012; G.N. 5176 of 2012
Section:	39	Heading:	When person is disqualified from being nominated as a candidate and from being elected as a Member	Version Date:	01/10/2012

(1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person-

(a) is-

- (i) a judicial officer; or
- (ii) a prescribed public officer; or
- (iii) an officer of the Legislative Council or a member of staff of The Legislative Council Commission; or (Amended 48 of 1999 s. 24)

(b) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not either-

- (i) served the sentence or undergone such other punishment as a competent authority may have been substituted for the sentence; or
- (ii) received a free pardon; or

(c) has been convicted of treason; or

(d) on the date of nomination, or of the election, is serving a sentence of imprisonment; or

(e) without limiting paragraph (b), where the election is to be held or is held within 5 years after the date of the person's conviction, is or has been convicted-

- (i) in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine; or
- (ii) of having engaged in corrupt or illegal conduct in contravention of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554); or
- (iii) of an offence against Part II of the Prevention of Bribery Ordinance (Cap 201); or
- (iv) of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap 541); or (Replaced 10 of 2000 s. 47)

(f) is-

- (i) ineligible to be a candidate, or to be elected as a Member, at the election; or
- (ii) disqualified from being a candidate, or from being elected as a Member, at the election, because of the operation of this or any other law; or

(g) is a representative or salaried functionary of a government of a place outside Hong Kong; or

(h) is a member of any national, regional or municipal legislature, assembly or council of any place outside Hong Kong, other than a people's congress or people's consultative body of the People's Republic of China, whether established at the national or local level; or

(i) is an undischarged bankrupt or, within the previous 5 years, has either obtained a discharge in bankruptcy or has entered into a voluntary arrangement within the meaning of the Bankruptcy Ordinance (Cap 6) with the person's creditors, in either case without paying the creditors in full. (Amended 25 of 2003 s. 22)

Appendix II

Press Releases

繁體版 | 簡體版 | Email this article | www.info.gov.hk

Government's statement in response to court's judgment on disqualification of persons with unserved prison sentences as candidates for LegCo elections

In response to the Court of First Instance's judgment on June 14, 2012, regarding two judicial review cases on the right of persons with unserved prison sentences to be qualified as candidates for Legislative Council (LegCo) elections, a spokesman for the Constitutional and Mainland Affairs Bureau stated the following today (July 12):

"The LegCo elections have all along been conducted in accordance with the electoral legislation enacted by the LegCo. Section 39(1)(b) of the LegCo Ordinance which disqualifies persons with unserved prison sentences from being nominated as candidates at a LegCo election and from being elected as Members has been in place for many years.

"The Court handed down the judgment on the relevant applications for judicial review holding that section 39(1)(b) of the LegCo Ordinance is not a proportionate restriction of the right to be elected and declaring it to be unconstitutional.


"After carefully examining the judgment, the Administration has decided not to appeal against the judgment. We believe the Administration's decision is in the interest of promoting certainty and smooth conduct of the upcoming LegCo election in September. However, the Administration is of the view that section 39(1)(b) was enacted to serve legitimate aims, and there is a need to carefully re-examine the reasons for and against disqualifying persons to be nominated as candidates. There is a need to maintain public confidence in the LegCo and LegCo Members and ensure the LegCo's proper operation, as well as maintain public confidence in the electoral process.

"In this connection, the Administration will conduct a review on the qualification of persons with unserved prison sentences as candidates for LegCo elections. We shall consult the public on this matter and other related issues at an appropriate juncture and propose changes to the relevant electoral legislation accordingly if necessary.

"Meanwhile, the 2012 LegCo election will continue to be organised in accordance with the prevalent electoral laws, as read with the latest judgment of the Court of First Instance."

Ends/Thursday, July 12, 2012
Issued at HKT 16:00

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文章總數: 1 篇

1. 新報 | 2012-04-22
報章 | A06 | 港聞

未服刑恐難參選 入稟指立會違憲 社民連提覆核撐長毛

立法會議員「長毛」梁國雄因衝擊遞補機制公眾論壇，被判監兩個月，獲保釋等候上訴，惟他可能因此無法參加今年9月的立法會選舉，因現行《立法會條例》規定任何被判監但未服刑人士，會喪失參選的資格。兩名社民連成員以司法覆核形式，分別入稟高院為「長毛」護航，要求法庭裁定有關限制違憲，損害他們兩人的選舉權及被選舉權，高院原訟庭將於本周三（25日）展開初步研訊，決定是否受理案件。採訪：法庭組

兩名覆核申請人分別是黃軒璋和黃浩銘，與訟人是律政司司長。黃浩銘的入稟狀更將立法會議員梁國雄列為有利益相關的第三方。

被剝奪被選和選舉權

有意參選今年9月9日立法會選舉的黃軒璋（23歲），去年於「港鐵競步賽」開幕，趁運輸及房屋局局長鄭汝樺發言時，衝上台抗議港鐵加價，期間黃軒璋更成功突圍，把鄭汝樺的咪搶去，高叫口號及撒錢。

事後警方秋後算帳，以「擾亂公眾地方秩序」罪名予以起訴，經審訊後罪成，判監兩星期，現正保釋等候上訴。上訴聆訊日期未知悉，由於本身也有可能喪失參選資格，故利人利己下提出司法覆核，指現行法例不合理地限制其受《基本法》保障的公民被選舉權。

另一覆核申請人黃浩銘（24歲）本人是「長毛」的支持者，去年3月6日黃浩銘因參加反財政預算遊行的堵路行動，而被票控在公眾地方擾亂秩序罪名，最終無罪釋放。黃浩銘今次以選民身份入稟法院提訟，指法例不合理地限制其公民選舉權，違反《基本法》、《香港人權法》和《公民及政治權利國際公約》。

兩份訴訟書的內容大同小異，均是指《立法會條例》542章第39(1)(b)(i)條和39(1)(d)條，抵觸了《基本法》第25、26、28、39條，《香港人權法》383章第8段5(1)、5(4)、11(4)、21條，以及《公民及政治權利國際公約》第9(1)、9(4)、14(4)和25條的規定，故《立法會條例》施加的參選限制是不合理和違憲。

指迫使長毛放棄上訴

黃浩銘的入稟狀末段特地指出，《立法會條例》對作為第三方的梁國雄尤其不公平，「長毛」不應因為被判短期監禁而給剝奪參選9月立法會選舉的政治權利，在法例的規限下，容許「長毛」參選的惟一辦法，其實是要他放棄上訴，甘願入獄服刑兩個月，才可以趕及今年9月進行選舉之前服畢刑期，報名參選。若「長毛」真的無法競逐連任，黃浩銘亦不能行使憲法賦予的選舉權，投他一票。

入稟狀編號：HCAL51&52/2012

文章編號: 201204220330122

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文章總數: 1 篇

1. 明報 | 2012-06-07
報章 | A12 | 港聞

帶罪禁參選長毛提覆核 倘敗訴即撤保服刑

【明報專訊】因衝擊替補機制論壇被判囚兩個月的社民連立法會議員梁國雄，昨日提司法覆核挑戰《立法會條例》中被定罪而未服刑者不能參選立法會選舉的規定，法官將於本月14日宣布裁決；而獲准保釋上訴的梁國雄已有兩手準備，若司法覆核敗訴，將效法同案被告黃洋達做法，裁決翌日申請撤銷保釋，務求盡快服畢40天刑期，趕及在7月底登記參選來屆立法會。

梁國雄昨在庭上陳辭指出，《基本法》賦予公民參選及選舉權，但《立法會條例》39條的規定，卻逼他放棄憲法給予他的保釋權，才能享有這參選及選舉權，是極不合理。

「當選與否應由市民決定」

他又指現在立法會已有機制，若有議員被判入獄3個月，其他議員可提出動議將他踢出立法會，而且有刑期在身的立法會參選人若當選，亦反映了市民明知他可能入獄仍投票給他，顯示有刑期在身的人是否適合當立法會議員，應由選民及由選民選出來的立法會議員決定，而非由條例「一刀切」剝奪其參選權。

政府：入獄礙工作

代表政府的資深大律師唐明治說，考慮條例是否合理時，要回顧條例的立法原意及背景，他指本港民主制度算是初起步，按《基本法》方向亦應是循序漸進實現民主，維護公眾對立法會及立法程序的信心是非常重要的，以本港現在傾向保守的社會，大部分人亦不會容忍「帶罪之身」及有案底紀錄的人擔任立法會議員。他又指出，仍未知須否服刑的人一旦當選，將來可能因入獄而未必能履行職務，會影響立法會的穩定及運作。

官質疑政府論點

不過，政府這兩論點均受到法官林文瀚的質疑，指即使沒有刑期在身的候選人當選後，亦可能因健康問題不能履行職務，又指梁國雄有案底紀錄，亦曾入獄，最終卻能透過選舉晉身立法會。

梁國雄亦說，如果一個立法會議員選擇不出席會議，這跟是否入獄沒有分別，而且諷刺的是，條例沒有拒絕被判有罪但獲准緩刑的人參選，將來有可能在議會有10個身有緩刑令的議員，若以政府說法來看，這同樣會影響市民對立法會的信心。

針對被判緩刑及入獄者的待遇有所不同，唐明治則表示，這正好反映兩者涉及的罪行嚴重性是一條清晰界線。

【案件編號：HCAL51&54/12】

法官語錄高院法官林文瀚：

（回應政府所指，未服刑者當選立法會議員，令立法會出現不明確情況）人生本來就有很多不明確，例如議員的健康亦會造成不明確……正如梁國雄的例子，即使他有案底紀錄，但仍然當選立法會議員。

梁國雄與政府論點

梁國雄

1

一刀切不理刑期長短、罪行類別便拒絕被判入獄但未服刑的人參選立法會，不合常理

2

選民投票時已知道立法會參選人有可能入獄，參選人能否成為議員應由選民決定，梁本身亦有案底及入獄，但仍能當選

3

即使當選後議員需入獄，仍可申請外出出席會議，相反其他沒有被判刑議員（因其他原因）不出席會議，亦會影響立法會運作

4

條例沒有阻止被判監但獲准緩刑的人參選立法會，一旦這些人當選，亦會影響公眾對立法會及立法程序的信心，反映條例不合理

政府

法庭判被告入獄，已反映罪行的嚴重性

香港民主制度只是剛起步，社會仍傾向保守，大部分人不能容忍立法會議員將會入獄或有案底

一旦「有刑期在身」的議員當選後要服刑，會為立法會帶來不穩定因素，阻礙立法會運作

立法目的是要維護公眾對立法會及立法程序的信心

資料來源：雙方陳辭

長毛及黃洋達不同行動的後果

社民連梁國雄

項目

提出司法覆核

行動目的

法院宣布條例違憲，永久撤銷有關限制

可能結果

假如勝訴，梁不用放棄保釋亦可參選；但若梁敗訴，梁會即時自撤保釋服刑，以趕及參選立會

人民力量黃洋達

被定罪後迅即自撤保釋入獄服刑

盡早服刑完畢，確保能趕及參選

假如梁勝訴，而一旦黃他日上訴成功，黃便「白坐牢」；但若梁敗訴，黃仍能確保可參選立會長毛及黃洋達不同行動的後果

資料來源：明報資料室

文章編號: 201206070040098

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文章總數: 1 篇

1. 星島日報 | 2012-06-22
報章 | A22 | 法庭

判監未服刑可參選立會 刑期少於三月無礙履行職務

立法會條例禁止被判監但未服刑人士參選的條文，上周被高等法院裁定違憲，法官林文瀚昨頒布書面判詞解釋，條文推出時是為了阻止逃犯參選，忽略考慮保釋等候上訴人士的參選權，又認為毋須擔心未服刑人士無法履行議員職責，因為立法會主席有權宣告無力履行職務的議員喪失議員資格，選民投票時亦有智慧去選擇。

高院早前裁定立法會條例禁止被判監但未服刑人士參選的條文違憲，昨下達裁決理由。

此外，法官判律政司要承擔兩名司法覆核申請人，立法會議員梁國雄及社民連議員助理黃軒瑋的訟費。

「長毛」昨到高院領判詞（見圖）後表示，如果律政司提出上訴或申請暫緩執行裁決，他亦「無佢符」，因為主動權在律政司手中。如果律政司明知條例違憲但決意要執行，阻止他參選立法會，長毛認為「人在做，天在看」，法庭便成為廢物，可以「執笠」。政制及內地事務局發言人表示，政府會細研判詞，再決定下一步行動。

議員缺席三月資格可褫奪

法官裁定《立法會條例》中，禁止被判監但未服刑人士參選的條文，違反《基本法》及《人權法》保障的選舉權和被選舉權。他在判詞指出，同一條例之下有條文禁止被判監超過三個月或就所訂明罪行被裁定罪名成立人士參選立法會，因此長毛所挑戰的條文，只限制被判監不多於三個月人士。

法官認為被判監不多於三個月人士即使當選後服刑，刑期亦只佔四年立法會任期中一小部分，而且人生無常，議員也會患病或發生不幸事故，導致暫時無法履行職務。法官指現時候選人不可能向選民隱瞞有刑期在身，毫無疑問選民一定會運用智慧決定是否投這些參選人一票。

法官又指出立法會主席可以根據《基本法》第七十九條，在某些情況下宣告無力履行職務的議員喪失議員資格，其中包括未得到立法會主席同意，連續三個月不出席會議而無合理解釋的議員，這反映《基本法》認為無需要褫奪缺席會議少於三個月的議員的資格。

案件編號：高院憲法及行政訴訟五一、五四一一二〇一二。

文章編號: 201206220030075

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文章總數: 1 篇

1 .南華早報 | 2012-06-22
報章 | CITY4 | CITY | By Austin Chiu

Provisional Legco 'was misled on jail-term law'

A High Court judge says the provisional Legislative Council was misled into passing an unconstitutional law that bans anyone awaiting a short jail term from standing for election.

Mr Justice Johnson Lam Man-hon made his comments in a written ruling handed down yesterday to explain his ruling in favour of lawmaker Long Hair Leung Kwok-hung and his decision to strike out the disputed Legislative Council Ordinance section.

The law disqualified from nomination anyone serving, or due to serve, a jail term during the nomination or election period.

Leung and fellow League of Social Democrats member Anson Wong Hin-wai sought the judicial review as they both face pending jail terms and wish to run in the September Legco elections. The judge ruled in their favour last week.

In the 51-page judgment, Lam said the provisional Legco - the body in place just before the 1997 handover - voted in favour of the law because the government used misleading terms such as fugitive and escaped convicts, to explain its need.

The judge found the legislation failed to give any consideration to the rights of a person on bail pending appeal, although he did not say that the government had deliberately misled lawmakers on the issue.

The judge also pointed out that there were already provisions to disqualify lawmakers sentenced to jail terms in excess of three months or convicted of specified offences.

He rejected the government's claim that allowing people facing jail terms to run for office would create uncertainty and confuse voters. He said it was unlikely that a candidate's conviction or potential jail sentence could be hidden from voters.

I have no doubt that the voters in Hong Kong are intelligent enough to take into account the potential contingency of imprisonment of such candidates in deciding whether to cast their votes in favour of him or her, Lam wrote.

Leung was sentenced to two months in jail for disrupting a consultation forum on a proposal to scrap Legco by-elections last year.

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1. 文匯報 | 2012-07-13
報章 | A22 | 香港新聞

未服刑可參選 政制局不上訴

香港文匯報訊（記者 鄭治祖）高等法院原訟法庭於2012年6月14日裁定，《立法會條例》第39(1)(b)條列明，被判監禁而未服刑者會喪失獲提名為立法會選舉候選人及當選為議員的資格的條文，不符合相稱的原則，並宣告該條文不合憲。政制及內地事務局昨日宣布，當局決定不會就裁決提出上訴，而當局會檢討有關規定並諮詢公眾意見。「我們認為此決定有利於即將於9月舉行的立法會選舉能明確及順利地進行。」

社民連立法會議員「長毛」梁國雄由於2011年9月1日衝擊替補機制論壇而被判監兩個月，獲准保釋等候上訴。不過，據《立法會條例》第39(1)(b)條規定，被判監禁而未服刑者不可獲提名為立法會選舉候選人及當選為議員，為趕及於今年9月參與立法會換屆，他提出司法覆核並挑戰有關條文。法官林文翰在6月14日宣判，裁定有關條例牴觸《基本法》與《人權法》中有關參選權和政治權利的條文。

政制及內地事務局發言人昨日發表聲明，指高院原訟法庭頒下的判詞，裁定了《立法會條例》第39(1)(b)條對被選舉權的限制不符合相稱的原則，並宣告該條文不合憲。當局在細心研判判詞後，決定不會就裁決提出上訴。

強調維護對立會信心

不過，發言人強調，一直以來，立法會選舉均依照由立法會制訂的相關選舉法例舉行。《立法會條例》第39(1)(b)條已存在多年，而當局認為，《條例》第39(1)(b)條是為了達致合法目的而制訂，有需要仔細地再考慮各種支持及反對喪失參選資格的因素。「我們有需要維持公眾對立法會以及立法會議員的信心，並確保立法會順利運作以及維持公眾對選舉制度的信心。」

就此，當局會就未服監禁刑罰人士參加立法會選舉的資格進行檢討。「我們會在適當時候就此及其他相關事宜諮詢公眾。如有需要，我們會建議對相關的選舉法例作出適當修訂。」在此期間，2012年立法會選舉會繼續按照現行的選舉法例，包括原訟法庭的最新裁決進行。

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