

**Textual Comparison between
the Hong Kong Court of Final Appeal (Amendment) Bill 2001
and the Administration of Justice Act 1969**

Hong Kong Court of Final Appeal (Amendment) Bill 2001	Administration of Justice Act 1969	Comments
<p>27A. <i>Definitions</i></p> <p>In this Division— "Court of First Instance" (原訟法庭) means the Court of First Instance of the High Court; "judge" (法官) means a judge of the Court of First Instance, a recorder of the Court of First Instance or a deputy judge of the Court of First Instance.</p>	<p>12 <i>Grant of certificate by trial judge</i></p> <p>(8) In this Part of this Act "civil proceedings" means any proceedings other than proceedings in a criminal cause or matter, and "the judge", in relation to any proceedings to which this section applies, means the judge ... referred to in paragraph (a) ... of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.</p>	<p>1. "Civil cause or matter" referred to in section 27B proposed under the Bill is defined in section 2 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) ("<i>the Ordinance</i>") to mean a cause or matter other than a criminal cause or matter.</p>
<p>27B. <i>Civil appeals</i></p> <p>(1) Notwithstanding section 22, an appeal may lie to the Court at the discretion of the Court of First Instance and the Court, from any judgment of the Court of First Instance in any civil cause or matter if the criteria set out in section 27C(1)(a), (b) and (c) are satisfied.</p>	<p>12 <i>Grant of certificate by trial judge</i></p> <p>(2) This section applies to any civil proceedings in the High Court which are either— (a) proceedings before a single judge of the High Court ... , or (b) ... (c) proceedings before a Divisional Court.</p>	<p>2. In the UK, section 66 of the Supreme Court Act 1981 provides that a Divisional Court shall be constituted of not less than two judges. Where the two judges disagree concerning an appeal, cases in the UK indicate that the modern practice is for the appeal to be treated as dismissed. The older procedure by which the junior judge withdrew his judgment is no longer followed.</p>

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<p>(2) No appeal shall be admitted unless—</p> <ul style="list-style-type: none">(a) a certificate has been issued by the trial judge under section 27C; and(b) leave to appeal has been granted by the Court under section 27D.	<hr/>	<p>Under section 32 of the High Court Ordinance (Cap. 4), every civil proceeding in the Court of First Instance ("<i>CFI</i>") and all business arising therefrom shall be heard and determined by a judge of CFI sitting alone, but the Chief Justice may direct any proceeding or class of proceeding in CFI to be heard and determined by two or more judges. In its reply dated 17 July 2001, the Administration stated that it is very rare for proceedings in CFI to be heard by two or more judges, and if this happens, the application under section 27C would be decided collectively.</p>

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<p><i>27C. Grant of certificate by trial judge</i></p> <p>(1) Where on the application of any of the parties to any proceedings in respect of which an appeal may lie under this Division the judge is satisfied—</p> <p>(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings; and</p> <p>(b) that a sufficient case for an appeal to the Court has been made out to justify an application for leave to bring such an appeal; and</p> <p>(c) that all the parties to the proceedings consent to the grant of a certificate under this section,</p> <p>the judge, subject to the provisions of this Division, may grant a certificate to that effect.</p>	<p><i>12 Grant of certificate by trial judge</i></p> <p>(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—</p> <p>(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings, and</p> <p>(b) that a sufficient case for an appeal to the House of Lords under this Part of this Act has been made out to justify an application for leave to bring such an appeal, and</p> <p>(c) that all the parties to the proceedings consent to the grant of a certificate under this section,</p> <p>the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.</p>	<p>3. The reference to a point of law of "great general or public importance" in section 27C(2) proposed under the Bill is the same as the criteria for granting leave to appeal to the Court of Final Appeal ("<i>the Court</i>") under section 22(1)(b) of the Ordinance. The same test has been used prior to 1997 to determine whether an appeal shall lie to the Privy Council under Rule 2(b) of the Order in Council regulating appeals from the Supreme Court or Court of Appeal for Hong Kong to His Majesty in Council.</p>

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<p>(2) For the purposes of subsection (1)(a), the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of great general or public importance is involved in that decision and that that point of law—</p> <p>(a) relates wholly or mainly to the construction of an Ordinance or subsidiary legislation, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings; or</p> <p>(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or the Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Court (as the case may be) in those previous proceedings.</p>	<p>(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public important is involved in that decision and that that point of law either—</p> <p>(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or</p> <p>(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the House of Lords in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the House of Lords (as the case may be) in those previous proceedings.</p>	<p>4. Section 27C(2)(a) proposes that the point of law relates wholly or mainly to the construction of "an Ordinance or subsidiary legislation". "Subsidiary legislation" is defined in the Interpretation and General Clauses Ordinance (Cap. 1) to mean any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect. Subsidiary legislation does not normally include any Code of Practice or Technical Memorandum.</p> <p>Section 12(3) of the UK Act is wider in that the point of law relates wholly or mainly to the construction of "an enactment or of a statutory instrument". Under the Statutory Instruments Act 1946, where power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on any Minister of the Crown by that Act or any Act passed after the commencement of that Act, then if the power is expressed to be exercisable by statutory instrument, any document by which that power is exercised shall be known as statutory instrument.</p>

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<p>(3) For the avoidance of doubt, subsection (2)(b) applies to and in relation to a decision that involves a point of law relating wholly or mainly to the construction of the Basic Law as it applies to any other decision.</p>	<p>_____</p>	<p>5. There is no provision in the UK Act similar to section 27C(3) proposed under the Bill which relates to the Basic Law. Members may wish to discuss the scope of the relevant conditions.</p>
<p>(4) An application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings.</p> <p>(5) Notwithstanding subsection (4), the judge may in any particular case entertain any such application made at any time before the end of the following period—</p> <p>(a) 14 days beginning with the date on which the judgment is given; or</p> <p>(b) such other period as may be prescribed by rules of court.</p>	<p>(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings:</p> <p>Provided that the judge may in any particular case entertain any such application made at any later time before the end of the period of fourteen days beginning with the date on which that judgment is given or such other period as may be prescribed by rules of court.</p>	
<p>(6) No appeal shall lie against the grant or refusal of a certificate under this section.</p>	<p>(5) No appeal shall lie against the grant or refusal of a certificate under this section.</p>	

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<p>_____</p>	<p>(6) Her Majesty may by Order in Council amend subsection (3) of this section by altering, deleting, or substituting one or more new paragraphs for, either or both of paragraphs (a) and (b) of that subsection, or by adding one or more further paragraphs.</p> <p>(7) Any Order in Council made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.</p>	<p>6. Under section 12(6) and (7) of the UK Act, Her Majesty may by Order in Council add to, alter, delete or substitute the two conditions in section 12(3), but such Order is subject to annulment in pursuance of a resolution of either House of Parliament. No provision with similar effect is proposed in this Bill.</p>
<p><i>27D. Leave to appeal</i></p> <p>(1) Where in any proceedings the judge grants a certificate under section 27C, any of the parties to the proceedings may make an application to the Court for leave to appeal by way of a notice of motion at any time within—</p> <p>(a) 28 days from the date on which that certificate is granted; or</p> <p>(b) such extended time as in any particular case the Court may allow.</p>	<p><i>13 Leave to appeal to House of Lords</i></p> <p>(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the House of Lords may allow, any of the parties to the proceedings may make an application to the House of Lords under this section.</p>	<p>7. Application for leave to appeal is proposed to be made by way of a notice of motion under section 27D(1), but such application is made by way of petition under section 14(a) of the UK Act. Under Orders 8 and 9 of The Rules of the High Court (Cap. 4 sub. leg.), there are different requirements as to the form of notice of motion and petition and the minimum number of days between service and hearing.</p> <p>8. Under the proposed section 27D(1), an application to the Court for leave to appeal may be made at any time within 28 days from the date on which the trial judge grants a certificate. Under section 13(1) of the UK Act, the period for making such application is one month.</p>

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<p>(2) Subject to subsection (4), if on an application made under this section it appears to the Court to be expedient to do so, the Court may grant leave for an appeal to be brought directly to the Court; and where leave is granted under this section—</p> <p>(a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but</p> <p>(b) an appeal shall lie from that decision to the Court.</p>	<p>(2) Subject to the following provisions of this section, if on such an application it appears to the House of Lords to be expedient to do so, the House may grant leave for an appeal to be brought directly to the House; and where leave is granted under this section—</p> <p>(a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but</p> <p>(b) an appeal shall lie from that decision to the House of Lords.</p>	
<p>(3) Applications under this section shall be determined by the Appeal Committee, with or without a hearing.</p>	<p>(3) Applications under this section shall be determined without a hearing.</p>	<p>9. Section 27D(3) proposes that the application be determined by the Appeal Committee, with or without a hearing. Section 18 of the</p>

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<hr/>	<p>(4) Any order of the House of Lords which provides for applications under this section to be determined by a committee of the House—</p> <ul style="list-style-type: none">(a) shall direct that the committee shall consist of or include not less than three of the persons designated as Lords of Appeal in accordance with section 5 of the Appellate Jurisdiction Act 1876, and(b) may direct that the decision of the committee on any such application shall be taken on behalf of the House.	<p>Ordinance provides that an Appeal Committee shall consist of the Chief Justice and 2 permanent judges nominated by the Chief Justice, or 3 permanent judges nominated by the Chief Justice. The decision of the Appeal Committee shall be final and not itself subject to appeal. Section 13(3) and (4) of the UK Act requires the application to be determined without a hearing by a committee of the House of Lords comprising not less than three Lords of Appeal.</p>

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<p>(4) Without prejudice to subsection (2), no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 27C until—</p> <ul style="list-style-type: none">(a) the time within which an application can be made under this section has expired; and(b) where such an application is made, that application has been determined.	<p>(5) Without prejudice to subsection (2) of this section, no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 12 of this Act until—</p> <ul style="list-style-type: none">(a) the time within which an application can be made under this section has expired, and(b) where such an application is made, that application has been determined in accordance with the preceding provisions of the section.	

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<p><i>27E. Leave to appeal subject to conditions</i></p> <p>(1) Leave to appeal granted under section 27D(2) may be granted subject to such conditions as the Court considers necessary.</p> <p>(2) Section 25(2), (3), (4) and (6), with the necessary modifications, shall apply in relation to the grant of leave under this section as it applies to the grant of leave under that section.</p> <p>(3) Section 26 shall apply in relation to a judgment appealed from and grant of leave to appeal under this Division as it applies in relation to a judgment appealed from the grant of leave to appeal under Division 2.</p> <p>(4) Section 27 shall apply in relation to an application for final leave to appeal to the Court under this Division as it applies in relation to an application for final leave to appeal to the Court of Appeal or to the Court under Division 2.</p>	<p><i>14 Appeal where leave granted</i></p> <p>In relation to any appeal which lies to the House of Lords by virtue of subsection (2) of section 13 of this Act—</p> <p>(a) section 4 of the Appellate Jurisdiction Act 1876 (which provides for the bringing of appeals to the House of Lords by way of petition).</p> <p>(b) section 5 of that Act (which regulates the composition of the House for the hearing and determination of appeals), and</p> <p>(c) except in so far as those orders otherwise provide, any orders of the House of Lords made with respect to the matters specified in section 11 of that Act (which relates to the procedure on appeals),</p> <p>shall have effect as they have effect in relation to appeals under that Act.</p>	<p>10. The conditions referred to in the proposed section 27E, i.e. sections 25 (security for costs and variation of timetable), 26 (stay of execution) and 27 (sufficient notice of application) of the Ordinance are generally covered by section 14(c) of the UK Act. Section 14(c) makes reference to section 11 of the Appellate Jurisdiction Act 1876, which provides that an appeal to the House of Lords is subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords.</p>

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<p><i>27F. Cases excluded from section 27B(1)</i></p> <p>(1) No appeal shall lie under section 27B(1) in respect of a decision of the judge in any proceedings where by virtue of any enactment, apart from the provisions of this Division, no appeal would lie from that decision to the Court of Appeal, with or without the leave of the judge or of the Court of Appeal.</p> <p>(2) No appeal shall lie under section 27B(1) in respect of a decision of the judge where by virtue of any enactment, apart from the provisions of this Division, no appeal would (with or without the leave of the Court of Appeal or of the Court) lie from any decision of the Court of Appeal on an appeal from the decision of the judge.</p>	<p><i>15 Cases excluded from s 12</i></p> <p>(1) No certificate shall be granted under section 12 of this Act in respect of a decision of the judge in any proceedings where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie from that decision to the Court of Appeal, with or without the leave of the judge or of the Court of Appeal.</p> <p>(2) No certificate shall be granted under section 12 of this Act in respect of a decision of the judge where—</p> <ul style="list-style-type: none">(a) ...(b) by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would (with or without the leave of the Court of Appeal or of the House of Lords) lie from any decision of the Court of Appeal on an appeal from the decision of the judge.	

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<p>(3) Where by virtue of any enactment, apart from the provisions of this Division, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no appeal shall lie under section 27B(1) in respect of that decision unless it appears to the judge that apart from the provisions of this Division it would be a proper case for granting such leave.</p> <p>(4) No appeal shall lie under section 27B(1) where the decision of the judge, or any order made by him in pursuance of that decision, is made in the exercise of jurisdiction to punish for contempt of court.</p>	<p>(3) Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave.</p> <p>(4) No certificate shall be granted under section 12 of this Act where the decision of the judge, or any order made by him in pursuance of that decision, is made in the exercise of jurisdiction to punish for contempt of court.</p>	

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<hr/>	<p><i>16. Application of Part II to Northern Ireland</i></p> <p>(1) In the application of this Part of this Act to Northern Ireland—</p> <p>"the Court of Appeal" means Her Majesty's Court of Appeal in Northern Ireland;</p> <p>"the High Court" means the High Court of Justice in Northern Ireland;</p> <p>"statutory instrument" includes an instrument made under an enactment of the Parliament of Northern Ireland;</p> <p>for the references in section 12(2) to [section 3 of the Judicature Act 1925 there shall be substituted a reference to sections 6 and 7 of the Judicature (Northern Ireland) Act 1978]; and</p>	<p>11. Section 16 of the UK Act has no relevance to Hong Kong.</p>

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	<p>for the reference in section 15(2)(a) to the Matrimonial Causes Act 1965 there shall be substituted a reference to [the Matrimonial Causes (Northern Ireland) Order 1978] or any enactment re-enacting [that Order] (whether with or without modifications).</p> <p>(2) ...</p>	

The Legal Service Division
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