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Paper 1 Topical Notes for Cambridge A-levels

Law (9084)

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Chapter 1

The English legal system and its context

Codified legal system - where laws are organised into different categories

- requires the majority of legislature to agree to a change

- unwritten constitution / constitutional appeal

~ laws are meant to be applied as written, with less reliance on precedent
~ grouped by topic, written down, and organised

Common Law

~ unwritten law that developed from customs and judicial decisions
· **Anglo-Saxton** times, local courts designed disputes
· After **Norman Conquest** (1066), an organised system emerged

Common law crime VS statutory law crime

Common law crime:
- Comes from court decisions and traditions, typically not written in specific legislation (murder)

Statutory crime:
- clearly defined in written laws passed by a legislature (theft)

Custom - a rule or behaviour which develops in a community without being deliberately invented

· Egerton v Harding (1974)
· New Windsor Corporation v Mellor (1974)

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Religious law (generally based on Sharia or Judaic law)

- come from sacred texts of a religion, cover parts of personal or contract law

- can apply to countries with another legal system (codified, common law)
- eternal and unchanging
- govern a person's behaviour of beliefs
- issues are settled by a priest

Sharia Law (islamic law)

- Derived from the Quran and Hadith
- Covers aspects like marriage, divorce, inheritance, criminal justice, and personal conduct

Judaic Law (Halakha)

- Based on Torah (the Hebrew Bible)
- Provides rules on religious practices, ethics, daily life
- Covers things like worship, dietary restrictions, moral conduct

Mixed legal systems

- Private law - likely to be dominated by civil-code elements
- Public law- common law elements

Features of mixed legal systems (South Africa & Cyprus)

- Mix of common law and civil code rules
- The contributions of both common law and civil code rules to the whole law of the country are recognisable
- Private law is dominated by civil code elements & public law by common law elements

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Adversarial system - a type of legal system where two opposing sides present their case to an impartial judge and jury who determine the outcome

plaintiff = prosecutor vs defendant

- used in countries with common law jurisdictions
- accused has a right to remain silent
- innocent until proven guilty
- before a trial, there is an investigation run by the police, who have to follow certain procedural rules

Disadvantages of adversarial system (injustice)

- there might be a procedural issue, leading to the freedom of accused against whom there is strong evidence of guilt
- an innocent defendant has an unskilled lawyer or is unable to afford a lawyer to defend them

Inquisitorial system - where the judge plays an active role in investigating the facts of a case rather than simply acting as a neutral referee

- the judge is a fact finder, and the officers of the court (advocates) help the judge decide the truth, rather than take one side or the other
- a judge takes a more active role and questions witnesses

Advantages:

- reduces the advantage of wealth
- reduced bias - less emphasis on opposing sides 'winning', focusing more on uncovering the truth
- greater efficiency - because the judge leads the investigation, cases can move faster, reducing time and resources spent on lengthly trials

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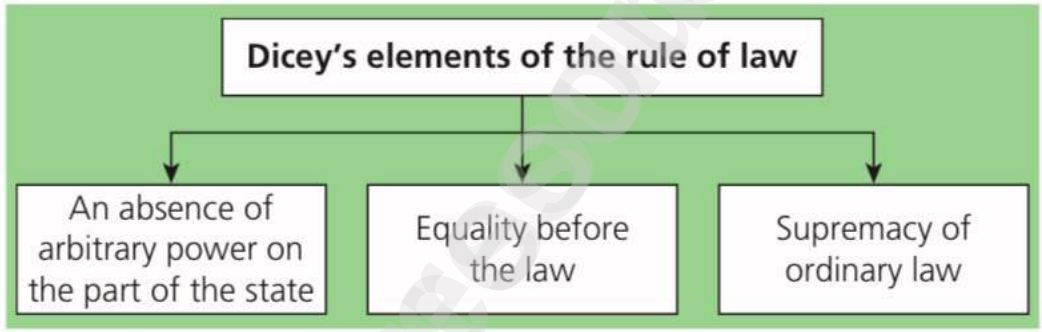
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Disadvantages

- cases may be lengthly due to a need for a thorough investigation
- defendants have less opportunity to challenge the evidence or present their case as strongly as adversarial system
- generally no right to remain silent
- the judge and advocates may form an opinion from early on, leading to potential bias

The rule of law

- All people are subject to and accountable to law that is fairly applied and enforced
- The process by which the laws of the country are enforced, administered, and enacted must be fair
- Supports democracy - governments and officials are also accountable under the law



1) no abuse of power
2) no special privileges
3) law should be made through proper legislative process (parliament) rather than individuals/ government

Issues with Dicey's view

- The parliament may grant arbitrary powers to the government
- Laws passed by the Parliament cannot be challenged through judicial review
- No actual equality before the law - high cost of taking a case to court limits unwealthy people

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Von Hayek's view

+ Agreed with Dicey that the key component of the rule of law was absence of arbitrary power
- Thought that the rule of law had become weaker as provided actions of the state were authorised by legislation. Any act in accordance with legislation was lawful

Joseph Razz - believed that rule of law was a way of controlling discretion rather than preventing it

He set out a number of principles which come from this wider idea, for example:

- There should be clear rules and procedures for making laws.
- The independence of the judiciary must be guaranteed.
- The principles of natural justice should be observed; these require an open and fair hearing, with all parties being given the opportunity to put their case.
- The courts should have the power to review the way in which the other principles are implemented, to ensure that they are being operated as demanded by the rule of law.

Key facts	
Dicey	• Absence of arbitrary power on the part of the state • Equality before the law • Supremacy of ordinary law
von Hayek	• Absence of arbitrary power on the part of the state • Rule of law weakened by an increasingly interventionist state • Modern state is directly involved in regulating economic activity in conflict with the rule of law
Raz	• Clear rules and procedures for making laws • Judicial independence must be guaranteed • Principles of natural justice should be observed • Courts should have the power to review the way in which the other principles are implemented

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Constitutional Reform Act (2005) - restructed the legal and judicial system to modernise and clarify the separation of powers. It recognised the rule of law and the importance of independence of the judiciary

Key changes include:

1) **Creation of the UK Supreme Court** - replaced the House of Lords as the highest court, separating judicial and legislative functions
2) **Reform of the Lord Chancellor Role** - removed his judicial functions to ensure clear separation between the judiciary, executive and legislature
3) **Judicial independence** - established the Judicial Appointments Commission to make the process of selecting judges more transparent and independent

Rule of Law and law making

- Acts of Parliament have to be passed by both Houses of Parliament
- The House of Lords checks the law-making
- Has voted against allowing serious criminal trials without a jury
- Government ministers can make laws using **statutory instruments** (don't have to be considered by the parliament

Checks on the statutory method of law making

1) Parliament must have previously passed an act granting power to a minister to make statutory instruments

2) Parliament has power to check and scrutinise the instrument

3) Statutory instrument can be challenged in the courts through judicial review, to ensure that the minister has not gone beyond the power granted by the parliament

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Legal system

- every defendant in a criminal case must have a fair trial
  - maintaining fairness and protecting citizens' rights
- no person can be imprisoned without a trial
- ordinary people need to be able to resolve disputes effectively
  - free from discrimination, corruption, public officials
- civil justice system should be accessible & affordable
  - has been public funding of cases for 20 years
  - cost of taking civil cases to court has increased

Substantive law - different areas of law (criminal, tort, contract, human rights)

Substantive criminal law
Substantive criminal law sets out the definitions of criminal offences. Criminal laws serve several purposes:

- to protect people, for example laws concerning murder, manslaughter and non-fatal offences against the person
- to protect people's property, for example laws concerning theft, burglary and criminal damage
- to prevent disruptive behaviour and protect public order.

! All offences should have a started maximum penalty and the courts cannot impose a higher penalty

Substantive civil law of tort

- aims to protect people and their property and give right to claim compensation

Issue: public funding for making a claim in tort is no longer available → financial difficulties make it harder to pursue a claim

Substantive law of contract
Substantive law of contract lays down rules on:

- when a contract is formed
- what events may make that contract void or voidable
- what can amount to a breach of contract.

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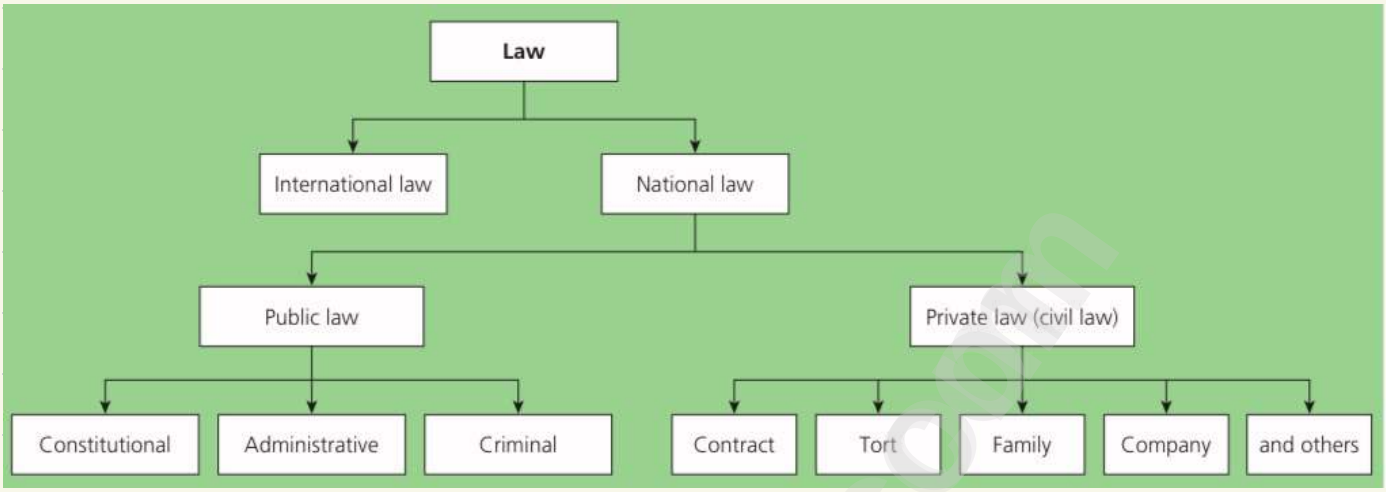
+ People can make whatever agreements they wish
- They have very little choice when making contracts with businesses

Substantive law of human rights - supports the rule of law
Example: all rights must be applied without discrimination
ECHR: incorporated into UK law by the Human Rights Act (1998) - sets out the right to liberty

Aspect	Civil Law	Criminal Law
Purpose	The main goal of civil law is to resolve disputes between individuals, organizations, or entities. It seeks to provide remedies (e.g., compensation) to the injured party or enforce specific rights. Examples include contract disputes, property ownership issues, or personal injury claims.	Criminal law aims to protect society by punishing offenses that harm individuals or the community. It focuses on deterring, punishing, and rehabilitating offenders. Crimes include theft, assault, or murder.
Person Starting the Case	Cases are initiated by the individual or organization that claims their rights have been infringed. This person or entity is called the *claimant* (or *plaintiff* in some jurisdictions).	Criminal cases are usually started by the state or government, as crimes are seen as offenses against society. The state is represented by the *prosecutor*.
Legal Name for Person Starting the Case	The person bringing the case is the **claimant** (or *plaintiff*), who seeks compensation or another legal remedy for harm done to them.	The party initiating the case is the **prosecutor**, typically acting on behalf of the government or public.
Courts	Civil cases are heard in **civil courts**, like the County Court or High Court in England and Wales, depending on the value or complexity of the claim. Specialized courts, like family or employment courts, may also handle specific disputes.	Criminal cases are heard in **criminal courts**, such as the Magistrates' Court for minor offenses or the Crown Court for more serious crimes in the UK.
Standard of Proof	The standard in civil law is the **balance of probabilities**, meaning the claimant must prove their case is more likely true than not (over 50%). This is a lower standard compared to criminal cases.	The standard in criminal law is **beyond a reasonable doubt**, meaning the prosecution must prove the defendant's guilt to a very high level of certainty, ensuring fairness in cases where liberty is at stake.
Persons Making the Decision	In civil cases, a **judge** typically decides the outcome. In rare cases, such as defamation, a **jury** may also be involved.	In criminal cases, decisions are made by a **magistrate** (for minor offenses), a **judge**, or a **jury** (for serious crimes in the Crown Court).
Decision	The decision in a civil case determines whether the defendant is **liable** (responsible for harm) or **not liable**. The focus is on resolving the dispute, not punishment.	The decision in a criminal case is whether the defendant is found **guilty** or **not guilty**. A guilty verdict can lead to penalties like imprisonment or fines.
Power of Court	Civil courts can order the defendant to pay **damages** (compensation), comply with an **injunction** (e.g., stopping harmful behavior), or enforce rights (e.g., specific performance of a contract).	Criminal courts have the power to impose **punishments**, such as **fines**, **community service**, or **imprisonment**. In some cases, they may also order rehabilitation programs or other corrective measures.

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Morality - a particular system of values and principles of conduct, especially one held by a specified person or society

Mary Warnock's view - some people regard things as matters of moral right AND moral wrong
eg: abortion, homosexuality, drugs, drunk driving

Factors contributing to the breakdown of common morality (Emilie Durkheim)
- Increasing specialisation of labour
- Growing ethnic diversity within society
- Fading influence of religious beliefs

Justice - according to law (Professor Hart)

Key facts	
Type of justice	**Description**
Procedural justice	Making and implementing decisions according to fair processes
Corrective justice	Sometimes known as restorative justice; when the law restores the imbalance that has occurred between two individuals, or between an individual and the state
Substantive justice	Where the content of the law itself must be just

→ legal aid access

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Legal Aid Sentencing and Punishment Offenders Act (LASPO) 2012 - reduced the availability of legal aid such as:

- Social welfare law (advice on welfare benefits)
- Employment
- Housing (except homeless cases)
- Immigration (except asylum)
- Family (except domestic violence)

No legal representation → no right to a fair trial
- Article 6 ECHR, HRA 1998

- Anyone arrested and taken to a police station is entitled to free legal advice

Exclusion clause - a contract term that limits or excludes a party's rights or liability

CASE EXAMPLES

Olley v Marlborough Court Hotel (1949)
An exclusion clause was invalid as it had not been brought to Mrs Olley's attention when she booked in at reception.

Spurling (J) Ltd v Bradshaw (1956)
Lord Denning observed that some exclusion clauses were written in 'regrettably small print', and stated that the more harsh or unusual the term was, the more it needed to be brought to the attention of the person signing it, for example by being 'printed in red ink, with a red hand pointing to it'.

The Unfair Contract Terms Act 1977:
- restricts the use of exclusion clauses

- aims to prevent those with strong bargaining power from taking an unfair advantage of weaker parties

Penalty clause - requires a party to pay a monetary penalty or face other consequences if they breach the contract

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The role of law in society

- a clear set of laws that are freely and easily accessible to all
- strong enforcement structures, and an independent judiciary, to protect citizens against the arbitrary use of power by the state, individuals, or any other organisation

In 2010, Lord Bingham published The Rule of Law:

He set out the rule of law through eight principles, which society, the state and the judiciary must embrace:

1. The state must abide by both domestic and international law. This means no government has the ability to act at whim.
2. People should only be punished for crimes set out by law.
3. Questions on the infringement of rights should be subject to the application of law, not discretion.
4. The law should be accessible, clear, precise and open to public scrutiny.
5. All people should be treated equally.
6. There must be respect for human rights.
7. Courts must be accessible and affordable, and cases should be heard without excessive delay.
8. The means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* disputes which the parties themselves are unable to resolve.

These principles result in certain roles for law in society:

- To protect people from harm – typically by the mechanisms of the criminal law with respect to harm by other people or by dangerous things such as unsafe machinery or pollution
- To ensure a common good – by providing facilities for all, such as education and healthcare
- To settle arguments and disputes – this is the idea of a civil justice system.

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Chapter 2

UK Parliament

House of Commons | House of Lords | Queen

Fixed-Term Parliaments Act (2011) - must be a general election every five years.

Green paper - a consultative document in which the government's view is put forward with proposals for law reform.

White paper - an official document that outlines legislative proposals or draft bills.

- white papers are published after green papers, taking into account the views received during the Green Paper consultation.

'knee jerk' - responding quickly to situations and rushing through law.

Bills

- get drafted by lawyers
- represents government's wishes but uses correct legal wording
- must be unambiguous, precise and comprehensive
- has to complete all the necessary stages in Parliament

Private Members' Bills - sponsored by individual MPs
During each parliamentary session, twenty private members are selected who can take their turn in presenting a Bill to Parliament.

- **limited time for debate** → first 6-7 members have a realistic chance of introducing a Bill on their chosen topic.

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Private Members' Bills become law, but there have been some important laws passed in this way, such as:

- the Abortion Act 1967, which legalised abortion in the UK
- the Marriage Act 1994, which allowed people to marry in any registered place, not only in register offices or religious buildings
- the Household Waste Recycling Act 2003, which places local authorities under a duty to recycle waste.

Ten-minute rule

Backbenchers (MPs who do not have any official position in the government) can also try to introduce a Bill through the 'ten-minute rule', under which any MP can make a speech of up to ten minutes supporting the introduction of new legislation. This method is rarely successful, unless there is no opposition to the Bill, but some Acts of Parliament have been introduced in this way. An example is the Bail (Amendment) Act 1993, which gave the prosecution the right to appeal against the granting of bail to a defendant. Members of the House of Lords can also introduce Private Members' Bills.

Public Bills: (examples)

- Constitutional Reform Act (2005)
- Legal Services Act (2007)
- LASPO (2012)
- Criminal Justice and Courts Act (2015)

Private Bills

- University College London Act (1996) - combined the Royal Free Hospital School of Medicine, the Institute of Neurology and the Institute of Child Health with University College.

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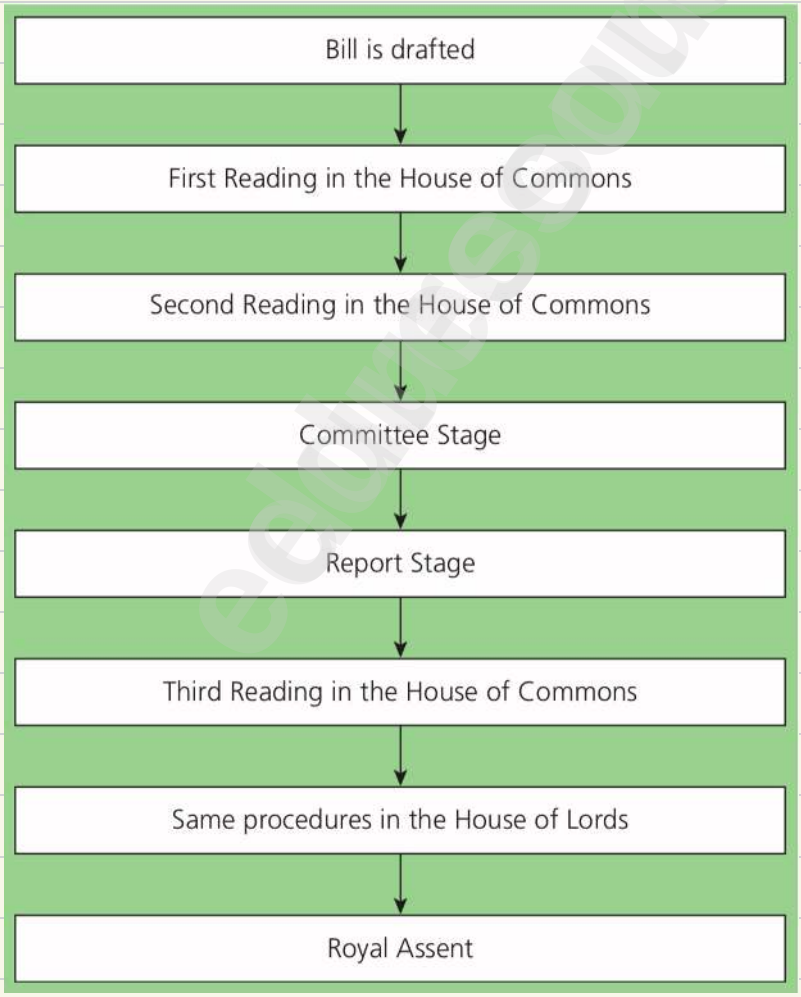
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▼ **Figure 2.2** Key facts about Bills

Key facts	
Type of Bill	**Description**
Government Bills	These are introduced by the government. They are likely to become law, as government business takes priority in Parliament.
Private Members' Bills	These are introduced by individual members of either the House of Commons or the House of Lords. They rarely become law.
Public Bills	These affect every person and every business in the country.
Private Bills	These only affect individual persons or companies.

The process in Parliament

First Reading - name and main aims are read out. No discussion or vote
Second Reading - main debate, verbal/formal vote (Aye/No)
Committee Stage - examine each clause in detail by 16-50 MPs. Bill is voted or passed
Report Stage - committee reports back to the House on any amendments to the Bill.
Third Reading - final vote on the bill. Usually no debate or vote



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'ping pong' - amendments being sent from one house to the other several times.

Parliament Acts 1911 & 1949 - limits the power of the House of Lords, allowing a Bill to become law even if the House of Lords rejects it. eg:

- the War Crimes Act (1991)
- the European Parliamentary Elections Act (1999)
- the Sexual Offences (Amendment) Act (2000)
- the Hunting Act (2004)

Royal Assent Act (1967) - the monarch will only have the short title of the Bills she is assenting

Key facts
A Bill has to pass all three parliamentary stages (Readings in the House of Commons, readings in the House of Lords and Royal Assent) before it can become an Act.
Most Bills are introduced into the House of Commons, where they are debated and receive detailed scrutiny.
The House of Lords will further debate and scrutinise the Bill. It can suggest amendments, which can either be accepted or rejected by the House of Commons.
The will of the House of Commons will eventually prevail, as it has elected representatives.
The Queen's Royal Assent is necessary, but a mere formality, for a Bill to become an Act of Parliament and part of the law of the land.

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Advantages of law making in Parliament	Disadvantages of law making in Parliament
• Law is made by elected representatives. This means it is democratic. As there has to be a general election at least once every five years, the electorate can vote out a government if it has not performed as the public expected or introduced promised reforms. • Acts of Parliament can reform whole areas of law in one new Act. An example is the Fraud Act 2006 in criminal law, which abolished all the old offences of deception and fraud and created a newer and, potentially, simpler structure of offences. Judges can only change the law in very small areas, as they can only rule on the point of law in the case they are deciding. • Acts of Parliament can also set broad policies and give the power to others to make detailed regulations, known as delegated legislation (see Chapter 3) This is an advantage because the general structure of a new law is laid down by Parliament but it allows for greater detail than if everything was contained in a single document. • Before a Bill is presented to Parliament, there will often have been consultation on the proposed changes to the law. This allows the government to take into consideration objections to their proposals. Also, as all Bills have to go through the lengthy discussion process in both Houses of Parliament, the new law will have been thoroughly discussed and scrutinised before being brought into force. • Law made by Parliament is certain and cannot be challenged by judges.	• Government and Parliament do not always have the time or inclination to deal with all the reforms that are proposed. This is particularly true of reform of 'lawyers' law', such as areas of criminal law or the law of contract. An example of law that is still awaiting reform is the law on assaults and other non-fatal offences against the person. The Law Commission proposed changes to this area of law in 1993. Reform is needed because the old law dates back to an Act of 1861, which was difficult to understand and does not always cover modern situations. In 1997, the government accepted that there was a need for reform and published a draft Bill the following year. However, this was not put before Parliament and this area of law has still not been reformed. • Even where the government introduces a Bill into Parliament, the process of becoming an Act with all the different readings, committee and report stages can take several months. • The government is in control of the parliamentary timetable and allows very little time for Private Members' Bills. Even when a private member does manage to introduce a Bill, it can be easily voted out by the government as it has the majority of seats in the House of Commons. The result is that very few Private Members' Bills become law. • Acts of Parliament are often long and complicated. This can make them difficult to understand by lawyers and the public. In fact, many of the cases that go to the Supreme Court on appeal are to interpret the words of an Act. • The law can become even more complicated where one Act amends an earlier Act. In this case, it is necessary to consult two or more Acts to find out exactly what the law is. • An Act can come into force as soon as it completes the parliamentary stages. However, in many cases an Act will not come into force until a later date, or over several dates. It may be necessary to consult several documents to find exactly when the relevant part of an Act came into force.

Parliamentary supremacy (Dicey's definitions)

1) Parliament can legislate on any subject matter it wants - no limits on what it can make laws about.

2) No Parliament can be bound by any previous Parliament. Each new Parliament should be able to make or change whatever laws it wishes.

3) An Act of Parliament cannot be contradicted by judges' decisions in court or pieces of delegated legislation.

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Limitations on parliamentary supremacy

- The effect of the Human Rights Act (1998)
- Devolution
- EU membership

Why UK left the EU

- Loss of sovereignty (the authority to govern itself)
- Limitations on Westminster parliamentary supremacy as EU law took priority over UK law.

Influences on Parliament - political pressure, public opinion, media

Political Pressure

- During the elections, all political parties publish a list of policies and suggested reforms they would carry out if they were elected as the next government (manifesto)
- can include policies such as finance, education, transport, and law order.
- elected party has up to five years to fulfill its promises
- throughout any session of Parliament, the government has the major say on which new laws are put before Parliament for debate.
- opposition parties hold the government to account when introducing its proposals to ensure that the manifesto promises are implemented.

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Advantages of political pressure	Disadvantages of political pressure
• Each political party has its proposals for reform ready and published in a manifesto during an election campaign so that, if it is elected as the government, the electorate know what it wishes to do in future parliamentary sessions to achieve its aims. • If the government has a majority of seats in the House of Commons, virtually every one of its policy proposals will be passed. This can be said to make the law-making process efficient. • The public know before the election what the broad proposals of each political party are, and have a choice as to which set of proposals and law reforms they would wish to see put in place. • Proposed changes to laws will be debated in Parliament and improvements to initial proposals can be suggested. • Members of the House of Lords have expertise in a wide range of topics. Suggestions made by the Lords to alter government proposals carry considerable weight and authority and are generally non-political.	• If a different party is elected in a general election from the previous governing party, it may decide to repeal or alter some of the laws that the previous government passed. This is because its policies are likely to be quite different from the previous government. Such changes can be costly and open to criticism, and can lead to piecemeal reform. • If the government has a large majority of seats in the House of Commons, it can force through its policy proposals. • If the government has only a small majority, it may be difficult or impossible to achieve changes to the law or manifesto commitments. • Suggestions to alter or improve the proposals made by experts in the House of Lords do not have to be accepted by the House of Commons or the government. • If a crisis occurs, such as the COVID-19 pandemic, the government's focus will be to take measures to deal with that crisis, which may differ from its manifesto commitments.

Public opinion

- Reflected through the media (social media) & pressure groups
- An individual may ask their MP to raise an issue in the Parliament
- Online petitions was introduced in 2015. It has to be supported by at least 6 people before it's published on the petitions site. It will stay open for 6 months

Petitions Committee will then:

- ask for more information (in writing or the petitioner)
- ask another parliamentary committee to look into it
- put forward the issue for debate if 100,000 signatures is achieved

Advantages of public opinion	Disadvantages of public opinion
• An individual may express their opinion to an MP or through an online petition. The government may support a campaign to change the law. • An individual may be successful in bringing their campaign to a wider audience if they can interest the media to publicise the campaign.	• The public could be ill-informed on an issue and make unreasonable opinions or unworkable demands of the government. • The government may decide to sacrifice its popularity and not act on, or delay acting on, a petition. • MPs are unlikely to be successful in introducing a Private Members' Bill to act on public opinion

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Pressure groups - people who have a special interest in a subject or cause, which they try to bring to the attention of the general public and/or the government.

Two types of pressure groups:

1) **Sectional pressure groups**
   - represent people's interests (often workers & professionals)

2) **Cause pressure groups**
   - promote a particular cause
   - often environmental & human rights related
   - eg: Hunting Act (2004) - banned hunting foxes with dogs
   - can sometimes campaign against a proposed change to the law

Lobbying - trying to persuade government ministers or individual MPs to support a pressure group's cause

- MPs may be persuaded to use the Private Members' Bill to introduce a bill supporting a pressure group's cause.

Lobbying example: Dunblane massacare 1996 - a gunman entered a school in Scotland and killed 16 children with their teacher
Firearms (Amendment) Act 1977 - banned the private ownership of most handguns.

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Advantages of pressure groups	Disadvantages of pressure groups
• There are many pressure groups with different aims and issues. A wide range of issues can be drawn to the attention of government. • Pressure groups often raise important issues. Environmental groups have made the government much more aware of the damage being done to the environment by greenhouse gases and other pollutants. • Pressure groups are experts when representing their members or their cause. They will have experts in their membership, or can employ experts, to argue their cause.	• Pressure groups may seek to impose their ideas, even where the majority of the public do not support their views. When trade unions call strike action involving a public service, this can disrupt the general public. • Sometimes two pressure groups have conflicting interests and campaign for opposing actions. For example, when the ban against fox hunting was considered, the League Against Cruel Sports wanted it banned, but the Countryside Alliance wanted it to be allowed to continue.

Media - the ways in which information is supplied to the public.

- **free press** - able to criticise government policy or demand government action.
- effective in a general election campaign, where every political party is keen to gain public support

Examples of media campaigns

- The Snowdrop campaign (for handguns to be banned)
- Dangerous Dogs Act 1991 - was introduced as a 'knee-jerk reaction' to media publicity
- Criminal Justice Act 2003 - reformed the 'double jeopardy' rule, allowing a person to be tried more than once if new evidence came up.

media campaigns

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Advantages of media pressure	Disadvantages of media pressure
• The media can raise awareness of public concern on an issue with the government, for example damage to the environment. • The public and pressure groups can use the media to raise concern about individual incidents, such as the Dunblane massacre and, more recently, terror-related attacks. • The media can inform and raise public awareness, which is essential to encourage the government to form policy, act and legislate. The government is ultimately responsible to the electorate and, especially before an election, will fear losing public support if it is not seen to be responding to an issue of public concern.	• While radio and television channels are required to remain politically neutral, this is not the case with newspapers or social media, which are willing to promote individual views and campaigns. Some newspapers give support to a specific political party and regularly promote its views. • There is no regulation on the expression of views on the internet or on social media. • Newspapers are commercial businesses and may be prepared to sensationalise an issue to expand their readership. This can be seen as part of the media manipulating the news and creating public opinion.

Law commission consists of

- Chairman
- High Court judge
- Four other law commissioners who are experts in certain areas of law
+ Researchers & draftsmen (prepare proposed Bills)

How the Law Commission works

1) Researches the area of law thought to be in need of reform
2) Publishes a consultation paper, seeking views on possible reform from lawyers, academics and anyone with an interest in the area under investigation
3) Draw up proposals for reform presented in a researched report (often includes a Draft Bill)

- To deal with old, unnecessary and irrelevant statues still in existence, the Law Commission prepares a Repeals Bill for the Parliament to consider.
  - by 2015, had been 19 Statute Law (Repeals) Acts, and 3000 old Acts have been repealed.

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Consolidation - drawing all the existing provisions together in one Act to make the law more accessible.

- The Law Commission produces about five Consolidation Bills each year

Codification - bringing together all the law on a topic, both statutory and judicial precedent, into one single law.

- After the establishment of the Law Commission, about 85% of its proposals were enacted by the Parliament (examples:)
  - ~ Unfair Contract Terms Act (1977)
  - ~ Supply of Goods and Services (1982)
  - ~ Occupiers' Liability Act (1984)

- only about 50% of its suggestions have become law due to lack of parliamentary time and lack of interest by the Parliament in technical law reform.

Some important reforms that have been passed

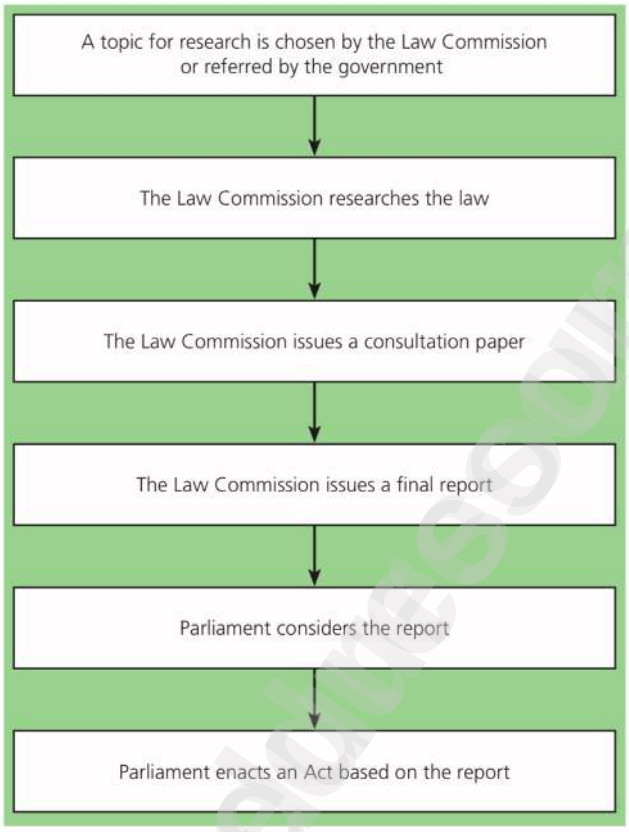
- The Fraud Act (2006) simplified the law on fraud
- The Corporate Manslaughter and Corporate Homicide Act (2007) - made corporations and organisations criminally liable for deaths caused by their working practices
- The Criminal Justice and Courts Act 2015 - reform of contempt by jurors and the creation of new offenses of juror misconduct in relation to using the internet

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▼ **Figure 2.10** Evaluating the Law Commission

Advantages of the Law Commission	Disadvantages of the Law Commission
• Areas of law are researched by legal experts. • The Law Commission is politically independent. • Its recommendations are based on thorough research. • Draft Bills are prepared and presented to Parliament. • If Parliament accepts a recommendation to codify an area of law, it becomes easier for lawyers and the public to find and understand. • Many old, irrelevant laws are removed from the statute book.	• There has been a failure of Parliament to implement its reforms. Parliament has to wait for the government to accept a report and act on it. • Parliament tends to concentrate on debates on broad policy areas, such as health and education, rather than on 'purely' legal issues. • The Law Commission recommended reforms to the criminal law on non-fatal offences in 1993, and to the civil law of negligence in 1998, but neither area of law has been changed. • The government is not bound to consult the Law Commission before bringing any changes in the law to Parliament; for example, it was not consulted on changes to sentencing practice and procedure.



▲ **Figure 2.11** How the Law Commission works

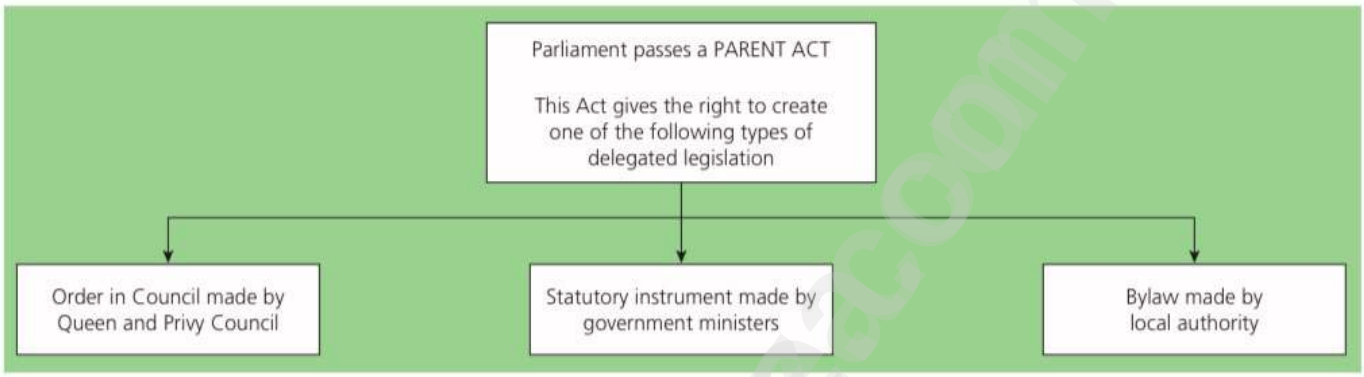
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Chapter 3

Delegated Legislation

~ As well as parliament, other people can be given the power to create laws
eg: the Privy Council, government ministers, local authorities, certain companies



▲ **Figure 3.1** Types of delegated legislation

Example of enabling Act - Police and Ciminal Evidence Act (1984)
~ gives authority to make Codes of Practice for the use of police powers

The Privy Council is made up of: the prime minister, other leading members of the government.
~ allows the government to make legislation without it having to be debated or voted on in Parliament.

Orders in Council can be made on:
- transfering responsibility between government departments
- bringing Acts of Parliament into force
- making law in emergencies under the Civil Contingencies Act 2004

~ can also be used to make other types of law
eg: altered the misuse of Drugs Act (1971) to downgrade cannabis to a Classic C drug before deciding to upgrade back to a Class B drug.

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• There must be an enabling Act allowing the Privy Council to make an Order in Council.

Statutory instruments - rules and regulations made by government ministers

~ each department deals with a different area of policy, and the minister in charge can make rules and regulations in respect to the matters it deals with.

Examples of long & detailed statutory instruments

» The Chemicals (Hazard Information and Packaging for Supply) Regulations 2009 were made by the Minister for Work and Pensions, under powers given in the European Communities Act 1972 and the Health and Safety at Work etc. Act 1974.
» Police codes of practice in relation to powers such as stop and search, arrest and detention were made by the Lord Chancellor and Secretary of State for Justice, under powers given by the Police and Criminal Evidence Act 1984.

in 2014, 3481 statutory instruments were made, but in 2019 it was only 1410
example: The Air Navigation Regulations 2020

Bylaws - local laws or regulations made by a local authority or organisation, under powers given by an Act of Parliament

~ a country council can pass bylaws affecting a whole country, while a district or town council can only make bylaws for its own district/town.
• often involve traffic control (eg: parking restrictions)
• others can be made for regulating behaviour: drinking in public places, banning bike riding, etc.
• can be made by public corporations & companies for matters within jurisdictions involving the public.

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▼ **Figure 3.4** Key facts on delegated legislation

Key facts	
Where Parliament delegates or gives power to a person or body outside Parliament to make law	
Orders in Council	Where the Privy Council is given power to make an Order in Council, e.g. to make law in emergencies and to transfer power between government departments
Statutory instruments	Where government ministers are given power to make detailed rules and regulations to supplement Acts of Parliament
Bylaws	Where local authorities and providers of essential services are given power to make laws covering their local area, in the area of their responsibility

The Legislative and Regulatory Reform Act (2006)
- gives ministers power to make any provision by order, if it will remove or reduce a 'burden' resulting from legislation:

- a financial cost
- an administrative inconvenience
- an obstacle to efficiency, productivity or profitability
- a sanction that affects the carrying on of any lawful activity

Any minister making a statutory instrument under the powers of this Act must consult various people and organisations, such as:

- organisations which are representative of interest substantially affected by the proposals, for example the Confederation of British Industry if the change affects businesses in general
- the Welsh Parliament for matters concerning Wales
- the Law Commission, where appropriate.

Orders made under this Act must be laid before Parliament to be considered by one of the following procedures:

- the negative resolution procedure, or
- the affirmative resolution procedure, or
- the super-affirmative resolution procedure.

Under this last point, the minister must have regard to:

- any representations made, or
- any resolution of either House of Parliament, or
- any recommendation by a committee of either House that is asked to report on the draft order.

gives parliament more control over delegated legislation made under Legislative and Regulatory Reform Act (2006)

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Parliamentary controls on delegated legislation

~ the enabling act will set boundaries within which the delegated legislation is to be made

- eg: will state which government minister can make regulations
- type of laws to be made + whether they can be made for the whole country or certain places only.
- whether the government department must consult other people before making the regulations

~ can also repeal the powers in the enabling Act at any time

Delegated Powers Scrutiny Committee (in the House of Lords) checks whether the provisions of any Bills delegate legislative powers inappropriately.
- Reports its findings to the House of Lords before the Committee Stage of the Bill, but has no power to amend Bills

Legislative and Regulatory Reform Act (2006)

- Parliament checks if the powers are being used properly

Pre-drafting consultation

- the government department can consult with all interested parties
- not bound to do so

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Scrutiny Committee

~ aka Joint Select Committee of Statutory Instruments

- reviews all statutory instruments
- when necessary, draws the attention of both Houses of Parliament to points that need forther consideration

However, the review is a technical one and not based on policy. The main grounds for referring a statutory instrument back to the Houses of Parliament are that it:

- imposes a tax or charge – this is because only an elected body has such a right
- appears to have retrospective effect that was not provided for by the enabling Act
- appears to have gone beyond the powers given under the enabling Act, or makes some unusual or unexpected use of those powers
- is unclear or defective in some way.

- can only review on these grounds and has to report its findings
- has no power to alter any statutory instrument

Affirmative resolutions

~ approval by both Houses of Parliament for a statutory instrument to become law

~ will be included in the enabling Act

eg: required before new or revised police Codes of Practice under the Police and Criminal Evidence Act (1984)

- Parliament cannot amend the statutory instrument
- Only government minister can approved, annulled or withdrawn by the government minister.

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Negative resolutions

- the relevant statutory instrument will be law unless rejected by Parliament within 40 days
- Issue: due to the number of statutory instruments issued, very few will be looked at in Parliament.

Questioning - individual ministess may be questioned by MPs regarding the work of their departments such as proposed regulations.

Court controls on delegated legislation - can be challenged on the grounds that it is 'ultra vires' ('beyond the powers')

Judicial review and locus standi (the right to bring a case)

~ a person must demonstrate a sufficient interest in the matter to have locus standi

- Any action to challenge will be taken in the **Queen's Bench Division of the High Court.**
- can only be taken by a person with locus standi or an interest in the proceedings (usually a person/body affected by a decision, or someone on their behalf.
- will be decided as a preliminary matter
- any delegated legislation that is ruled to be 'ultra vires' is void and not effective

Types of ultra vires:

Procedural - when a public authority fails to follow the required procedures outlined in the enabling act before making decisions or passing delegated legislation.

Substantive - when a public authority makes a decision or creates legislation that goes beyond the powers granted by the enabling act.

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▼ **Figure 3.5** Parliamentary controls on delegated legislation

Key facts	
Parliamentary control	**Description**
Pre-drafting consultation	Where a government department consults interested parties, whose views can be taken into account
Scrutiny Committee	Body that checks all statutory instruments after they have been brought into force, to ensure they have been properly made and are within the power of the government minister
Affirmative resolution procedure	Where Parliament agrees before the statutory instrument comes into force that it can be made
Negative resolution procedure	Where the statutory instrument comes into force subject to Parliament voting against its effect within 40 days; this is the most common form of control
Questioning	Where government ministers are questioned in the main chamber and in committee about a statutory instrument that has been brought into force and for which they are responsible

Procedural ultra vires

- concerned with how the delegated legislation is made and if any required procedures have been correctly followed
- not following the correct procedure will be ultra vires and void.

Substantive ultra vires

- concerned with whether the content of the delegated legislation is within the limits specified in the parent Act

Unreasonableness

Associated Provincial Picture Houses v Wednesbury Corporation (1948) - a piece of delegated legislation or a decision can be declared as 'Wednesbury unreasonable'.

Rogers V Swindon NHS Trust (2006) - a woman with early-stage breast cancer was prescribed the drug Herceptin by her doctor.
- NHS trust refused to provide this non-approved drug
- Trust was unable to show why the drug was prescribed for some patients and not others

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In addition to the above, the courts will presume that, unless an enabling Act expressly allows it, there is no power to do any of the following:

- make unreasonable regulations – in *Strickland v Hayes Borough Council* (1896), a bylaw prohibiting the singing or reciting of any obscene song or ballad and the use of obscene language generally was held to be unreasonable and so *ultra vires*, because it was too widely drawn in that it covered acts done in private as well as those done in public
- levy taxes
- allow sub-delegation.

Figure 3.6 Judicial controls on delegated legislation

Key facts	
Judicial control	**Description**
Judicial review and *locus standi*	Only a person or body affected by, or directly interested in, a decision can take a judicial review action
Procedural *ultra vires*	Where a piece of delegated legislation is made without following the correct procedure
Substantive *ultra vires*	Where the content of the delegated legislation is not within the limits specified in the parent Act
Unreasonableness	When a public body makes a decision that no reasonable body would have made

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Chapter 4

Statutory Interpretation

Interpretation clauses - definition clauses by the Parliament including certain words.

The literal rule :

- Developed in the early nineteenth century (has been used ever since)
- A judge gives words to their plain, ordinary or literal meaning, even if the result is not very sensible

R v Judge of the City of London Court (1892) - "If the words of an act are clear then you must follow them even though they lead to a manifest absurdity."

Advantages of use of the literal rule	Disadvantages of use of the literal rule
• The rule follows the words that Parliament has used. Since Parliament is the democratic law-making body, it is right that the judges should apply the law exactly as it is written. Using the literal rule to interpret Acts of Parliament prevents unelected judges from making law. • Using the literal rule should make the law more certain, as the law will be interpreted exactly as it is written by Parliament. This makes it easier for lawyers and the public to know what the law is and how judges will interpret it.	• The literal rule assumes every Act will be perfectly drafted. In the Dangerous Dogs Act 1991, Parliament used the word 'type' of dog, whereas it should have used the word 'breed', as there is no such thing as a type of dog. • When the law is drafted, it is not always possible to cover every situation that Parliament intended; see *Whiteley v Chappell* (1868). • Words may have more than one meaning so that the Act is unclear. • Following the words in an Act exactly can lead to unfair decisions; see *London and North Eastern Railway Co. v Berriman* (1946). Professor Michael Zander has denounced the literal rule as being mechanical and divorced from the realities of the use of language.

The golden rule - modification of the literal rule; looks at the meaning of literal words, but the judge is allowed to avoid an interpretation that would lead to an absurd result.

- the judge is also allowed to modify the words of a statue to avoid a repungent situation.

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Advantages of the golden rule	Disadvantages of the golden rule
• This rule respects the exact words of Parliament except in limited situations. It allows the judge to choose the most sensible meaning; see *R v Allen* (1872). • It can also provide sensible decisions in cases where the literal rule would lead to a repugnant situation; see *Re Sigsworth* (1935).	• It is very limited in its use, so it is only used on rare occasions, and it is not always possible to predict when courts will use the golden rule over the literal rule. • Michael Zander has described it as a 'feeble parachute'. In other words, it is an escape route but it cannot do very much.

The mischief rule

- gives a judge more discretion when interpreting legislation than the previous two rules.

There are four points the court should consider

- What was the common law before the making of the Act?
- What was the mischief and defect for which the common law did not provide?
- What was the remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?
- What was the true reason of the remedy?

Advantages of the mischief rule	Disadvantages of the mischief rule
• Judges have greater flexibility in decision making as it allows judges to look at the gap in the law that the Act was designed to cover. • It is preferred to the literal and golden rules as it achieves Parliament's intention. • Its use has been recommended by the Law Commission.	• There is a risk of judicial law making as judges are effectively re-writing the words of statutes. • Use of the mischief rule may lead to uncertainty in the law, making legal advice difficult. • It relies on the use of extrinsic aids to meet what is thought to be Parliament's intention.

The purposive approach

~ encourages the judges to decide what the Parliament meant to achieve

R v Secretary of State for Health (2003) - House of Lords decided the organisms created by CNR were defined as embryo. However, during 1990s, the Parliament could not have distinguished between embryos produced by, or without fertilisation.

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R v Registrar-General, ex parte Smith (1990)

~Mr. Smith wanted to know his biological mother to obtain his birth certificate under the Adoption Act 1976 ("shall... supply). The court decided not to supply any information as he had been convicted of two murders and suffered psychotic illness.

Advantages of use of the purposive approach	Disadvantages of use of the purposive approach
• As can be seen from the case examples, justice (or the 'right' result) is achieved in each case. • Judges can take account of new technology introduced after the passing of the Act. • Judges can fill in any gaps in the law left by Parliament or when dealing with new situations.	• It is undemocratic, as judges are interpreting laws. • It may be time consuming to work out what Parliament meant. • Legal advice is difficult, as lawyers will not know until the final judgment whether the judges are prepared to use this approach. • It may be impossible to find Parliament's intention.

Rules of language

- the *ejusdem generis* rule
- the express mention of one thing excludes others (*expressio unius exclusio alterius*), and
- a word is known by the company it keeps (*noscitur a sociis*).

Hobbs v CG Robertson Ltd (1920)
Flack v Baldry (1988)

The ejusdem generis rule - states that where there is a list of specific words followed by some general words, then the general words are limited to the same kind of items as the specific words.

Tempest v Kilner (1846)

Expresso unius exclusio alterius - where there is a list of specific words which is not followed by general words, then the Act applies only to the items in the list.

Inland Revenue Commissioners V Frere (1965)

Noscitur a sociis - the words must be looked at in context and interpreted accordingly; involves looking at other words in the same section or other sections of the Act. (to understand more clearly)

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4.3 Intrinsic aids to interpretation

These are not rules as such, but judges can use certain features within the statute to help make the meaning of some words clearer:

- The **long title** may explain briefly Parliament's intentions.
- Older statutes usually have a **preamble** that sets out Parliament's purpose in enacting that statute. Modern statutes either do not have a preamble or contain a brief one; for example, the Theft Act 1968 states that it is an Act to modernise the law of theft.
- Other useful internal aids are any **headings** before a group of sections, and any **schedules** attached to the Act.
- There are often also **marginal notes** explaining different sections, but these are not generally regarded as giving Parliament's intention as they will have been inserted after the parliamentary debates and are only helpful comments put in by the printer.
- An unusual approach was taken in the Arbitration Act 1996, where a statement of the principles of the Act is set out in an **interpretative section**, s 2. This is a new development in statutory drafting and one that could both encourage and help the use of the purposive approach.

4.4 Extrinsic aids to interpretation

Extrinsic aids are matters outside the Act which may help a judge explain the meaning of words in an Act. They are:

- previous Acts of Parliament on the same topic
- earlier case law – the higher the court, the greater authority the decision (see next chapter on judicial precedent)
- the historical setting
- dictionaries of the time the Act was passed.

Originally, there were strict rules that other extrinsic aids should not be considered. However, attitudes have changed and the following can be considered by judges:

- *Hansard*
- reports of law reform bodies
- international treaties.

Hansard - the official report of what was said in Parliament when an Act was debated.

- until 1993 was not allowed
- in Davis v Johnson (1979), Lord Denning tried to attack his ban in judgement, admitting that he had read the Hansard before making his decision.
- In Pepper v Hard (1993), the house of Lords relaxed the rule. (6/7 judges agreed except for Lord Chancellor.

~ Hansard may now be considered, but only where the words of the Act are ambiguous/obscure/lead to an absurdity.

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Lord Chancellor's disadvantages of Hansard:

- Time & cost (+25%)
- Has been referred in cases when there did not appear any ambiguity or absurdity.

Reports on law reform bodies (made by law reform agencies)

- Was not allowed previously, but got relaxed in the Black Clawson case (1975)

International conventions

- Was allowed in Fothergill v Monarch Airlines Ltd (1980)
- English court could consider any preparatory/explanatory materials published with an international convention.
- materials such as 'travaux préparatoires'
- Example: Laroche v Spirit of Adventure (UK) Ltd (2009)

The impact of EU law and the Human Rights Act 1988 on statutory interpretation

The European approach

- Has been accepted by judges as the correct one to use when dealing with EU law
- Has made judges more accustomed to the law, making them likely to continue using the purposive approach

The impact of the Human Rights Act 1998

- Section 3 says that as far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the European Convention on Human Rights (ECHR)

- Applies where one of the Convention rights is an issue, but does not apply otherwise

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▼ **Figure 4.5** Advantages and disadvantages of the rules and approaches of statutory interpretation

Literal rule	Golden rule	Mischief rule	Purposive approach
Advantages • Follows the wording set by Parliament • Prevents unelected judges making law • Makes the law more certain • Easier to predict how judges will interpret the law	Advantages • Respects the words of Parliament • Allows a judge to choose the most sensible meaning • Avoids the worst problems of the literal rule	Advantages • Deals with the mischief Parliament was trying to address • Fills in a gap in the law • Produces a 'just' result	Advantages • Leads to justice in individual cases • Allows for new developments in technology • Avoids absurd decisions
Disadvantages • Not all Acts are perfectly drafted • Words can have more than one meaning • Can lead to unfair or unjust decisions	Disadvantages • Can only be used in limited situations • It is not possible to predict when a judge will use it • It is a 'feeble parachute' (Zander)	Disadvantages • There is a risk of judicial law making • It is not as wide as the Purposive approach • It is limited to looking back at the old law • Can make the law uncertain	Disadvantages • May be difficult to find Parliament's intentions • Allows judicial law-making • Leads to uncertainty in the law

▼ **Figure 4.6** Key facts on statutory interpretation

Key facts		
	Brief definition	**Case examples**
Literal approach	Approaching problems of statutory interpretation by taking words at their face value	*London and North Eastern Railway Co. v Berriman* (1946)
Purposive approach	Looking at the reasons why a law was passed and interpreting the law accordingly	*R v Registrar-General, ex parte Smith* (1990)
	The three 'rules'	
Literal rule	Words given their ordinary, plain, grammatical meaning	*Whiteley v Chappell* (1868)
Golden rule	Avoids absurd or repugnant meanings	*Adler v George* (1964)
Mischief rule	Looks at the gap in the law and interprets the words to advance the remedy	*Coates v Crown Prosecution Service* (2011)
	Rules of language	
Ejusdem generis	General words that follow a list are limited to the same kind	*Hobbs v CG Robertson Ltd* (1970)
Expressio unius exclusio alterius	The express mention of one thing excludes others	*Tempest v Kilner* (1846)
Noscitur a sociis	A word is known by the company it keeps	*Inland Revenue Commissioners v Frere* (1965)
Aids to finding Parliament's intention	• Intrinsic – within the Act • Extrinsic – outside the Act, e.g. *Hansard* OR • Law Commission reports	• *Pepper (Inspector of Taxes) v Hart* (1993) • *Black Clawson Case* (1975)

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Chapter 5

Judicial Precedent

~ where decisions of judges create law for future judges to follow

The doctrine of judicial precedent

- Judges are able to make decisions in court, either to interpret parliamentary law or to decide a rule where there is not parliamentary law
- Can be looked at by other judges in later cases

Ratio decideni (the reason for deciding)

- Precedent can only operate if the legal reasons for a past decision are known.
- Judges make a speech at the end of a case, giving the decision and explaining the legal reasons for that decision
- Eg: summary of the facts of the case, principles of law

Sir Rupert Cross' definition of ratio decideni: any rule expressly or impliedly treated by the judge as a necessary step in reaching his conclusion

Obiter dicta (other things said)

- Judges in future cases do not have to follow it - non-binding precedent
- A judge can speculate on what the decision would have been if the facts of the case had been different - hypothetical situation

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Law reporting

- must be an accurate record of court decisions
- Incorporating Council of Law Reporting was set up in 1865
- Reporting has been controlled by courts, making them more accurate
- All judgements from the High Court and appeal courts are reported on the internet.
- can be free or paid

▼ **Figure 5.1** ICLR law reports

ICLR reports	
Case reference	**Court report**
Ch	Chancery Division of the High Court
QBD	Queen's Bench Division of the High Court
FD	Family Division of the High Court
EWHC	High Court (any Division)
EWCA	Civil Division of the Court of Appeal
EWCA Crim	Criminal Division of the Court of Appeal
UKSC	Supreme Court
Main subscription reporting services	
All ER	All England Law Reports
WLR	Weekly Law Reports

Binding precedent

~ a legal decision from a higher court that the lower courts must follow in future cases with similar facts.

Original precedent

~ a new precedent formed by the judge for future cases to follow
eg: Urquart and Others v Tate Modern (2020)

Persuasive precedent

~ courts do NOT have to follow it, but may consider and be influenced by when making a decision

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Persuasive precedent can come from:

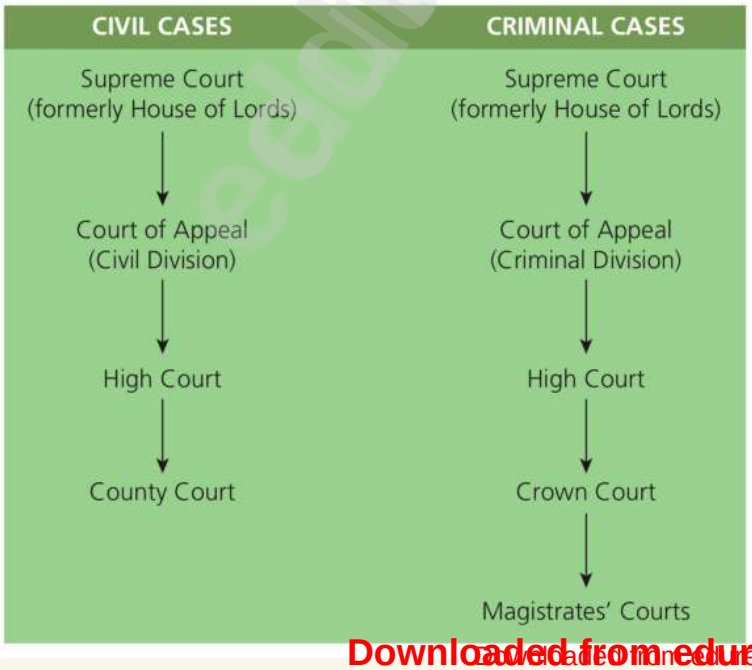
- Courts lower in the hierarchy
- Decisions of the Judicial Committee of the Privy Council
- Statements made obiter dicta
- A dissenting judgement
- Decisions of courts in other countries

▼ **Figure 5.3** Court hierarchy and judicial precedent

Key facts		
Court	**Courts bound by it**	**Courts it must follow**
Supreme Court	All lower courts	–
Court of Appeal	High Court County Court Crown Court Magistrates' Court	Supreme Court
High Court	County Court Magistrates' Court	Supreme Court Court of Appeal
Crown Court	Possibly Magistrates' Court	Supreme Court Court of Appeal
County Courts and Magistrates' Courts do not create precedent and are bound by all higher courts.		

Hierarchy of the courts

- every court is bound to follow any decision made by a court above in the hierarchy
- appellate courts (that hear appeals) are bound by their own past decisions



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Appellate courts : those that only hear appeals from lower courts.

Supreme Court - most senior court in the UK
~ decisions bind all lower courts in the English legal system
~ isn't bound by its own past decisions, but will generally follow them

Court of Appeal
~ Two divisions: Civil & Ciminal
~ must follow their own past decisions to some limited exceptions

Divisional Courts
~ Three courts: Queen's Bench, Chancery, Family
~ bound by their own past decisions to some limited exceptions

Courts of first instance: any court where the original trial is held

High Court
~ Judges are bound by decisions of all the courts above it
~ Judges do not have to follow each other's decisions, but will usually do so.

Inferior courts
~ Crown Court, the Country Court, the Magistrates' Court
~ bound to follow decisions by all higher courts
~ unlikely that their decision can create precedent

House of Lords/Supreme Court
• UK legal system used to be the House of Lords till October 2009
• Was then abolished and replaced by the Supreme Court
• London Street Tramways v London Country Council (1898) - House of Lords ruled that its own decisions are binding to ensure consistency and certainty in law.

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The Practice Statement

- Was issued in 1966 by the Lord Chancellor to change the rule in London Street Tramways v London Country Council
- Allowed the House of Lords to change the law when it believed it was wrongly decided
- Could refuse to follow precedent

~ isn't used often in Criminal Law as needs to be certain
Example: R v R and G (2003)

- In October 2009, the Constitutional Reform Act (2005) transferred the House of Lords' powers to the Supreme Court.

Human Rights cases

- Section 2(1)(a) of the Human Rights Act 1998 states that courts must take into account any judgement or decision of the European Court of Human Rights
- Court of Appeal does not need to follow the decisions on the House of Lords/ Supreme Court in human rights cases

Young v Bristol Aeroplane Co. Ltd (1944) exceptions to being bound by past decisions:
1) Conflicting decisions
2) Supreme Court overrules a Court of Appeal decision
3) Per incuriam - past decision made in error (Williams v Fawcett 1986)

Court of Appeal (Criminal Division)

- Can refuse to follow a past decision of its own if the law has been 'misapplied or misunderstood'
- Exceptions arise during criminal cases where people's liberty is involved
- R v Taylor (1950), R v Gould (1968), R v Spencer (1985)

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▼ Figure 5.4 The Court of Appeal and the doctrine of precedent

Key facts	
General rules for the Court of Appeal	**Comment**
Bound by the Supreme Court	• This is because the Supreme Court/House of Lords is above the Court of Appeal in the court hierarchy; it is also necessary for certainty in the law. • The Court of Appeal tried to challenge this rule in *Broome v Cassell and Co. Ltd* (1971) and *Miliangos* (1976), but the House of Lords rejected the challenge.
Bound by its own past decisions	This was decided by the Court of Appeal in *Young's Case* (1944), although there are minor exceptions (see below); in *Davis v Johnson* (1979), the Court of Appeal tried to challenge this rule, but the House of Lords confirmed that the Court of Appeal had to follow its own previous decisions.
Exceptions	**Comment**
Exceptions in *Young's Case*	The Court of Appeal need not follow its own previous decisions where: • there are conflicting past cases • there is a Supreme Court/House of Lords decision that effectively overrules the Court of Appeal decision • the decision was made *per incuriam* (in error).
Limitation of *per incuriam*	This is only used in 'rare and exceptional' cases (*Rickards v Rickards* (1989)) but was widened slightly in *R v Cooper* (2011) to include where all material considerations had not been placed before the court.
Special exception for the Criminal Division	This occurs where the law has been 'misapplied or misunderstood' (*R v Gould* (1968)). There is no need to follow the Court of Justice of the European Union.

Avoidance techniques

Overruling - where a court, in a later case states that the precedent decided in an earlier case is wrong
• may occur when a higher court changes a decision made in an earlier case by lower court
Example: Pepper v Hart (1993)

Reversing - where a court higher in the hierarchy overturns the decision of a lower court on appeal in the same case (decides that the decision was incorrect).

Distinguishing - when a court avoids following a binding precedent by showing that the facts of the current case are materially different from the earlier case, making the precedent inapplicable
Example: Rylands v Fletcher (1868) distinguished in Read v Lyons (1947)

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▼ **Figure 5.5** Evaluation of judicial precedent

Advantages of judicial precedent	Disadvantages of judicial precedent
• Certainty: because judges follow past decisions, people know what the law is and how it is likely to be applied in their case. • Consistency and fairness in the law: it is seen as just and fair that similar cases should be decided in a similar way. • Precision: as the principles of law are set out in actual cases, the law becomes very precise. • Flexibility: there is room for the law to change with society, as the Supreme Court can use the Practice Statement to overrule past cases that may not reflect current trends. • Time saving: precedent can be considered a useful time-saving device. • Filling gaps: where there is no statute law on a topic, judges are able to fill gaps to ensure the law is not at a standstill.	• Rigidity: following decisions of higher courts can make the law too inflexible, so that previous bad decisions may be perpetuated. • Complexity: with nearly half a million reported cases, it may not be easy to find all the relevant case law. The judgments themselves may be very long with no clear distinction between comments and the reasons for the decision; see *Dodd's Case* (1973). • Illogical distinctions: the use of distinguishing to avoid past decisions can lead to 'hair-splitting', so that some areas of the law have become very complex. • Slowness of growth: reform of the law is not possible unless a case comes before the courts to be decided.

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Chapter 6

Civil courts and civil process

Role and jurisdiction of the civil courts

1) County Court

- about 150 County Courts around the country

The main types of cases heard in this court are:

- claims in contract and tort
- all cases for the recovery of land, such as by a landlord from a tenant or by a lender where the householder has failed to pay the mortgage
- disputes over partnerships, trusts and inheritance up to a value of £350 000
- divorce and family and financial disputes arising from the breakdown of a relationship.

- Deals with small claims, fast-track & multi-track cases
- Much greater workload than the high court
- 2 million cases in 2018
- Small claims hearings are informal and held in private, with only the parties and the District Judge being present

~ Regular cases will nearly always be heard in open court by a single judge (Circuit Judge)

- members of the public are entitled to attend
- formal hearings with parties represented (solicitor, barrister)
- becoming more difficult for litigants to pay legal fees, thus representing themselves

2) High Court

- based at the Royal Courts of Justice in London
- has judges in different towns and cities throughout England and Wales

Three divisions: Queen's Bench Division, Chancery Division, Family Division

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Queen's Bench Division

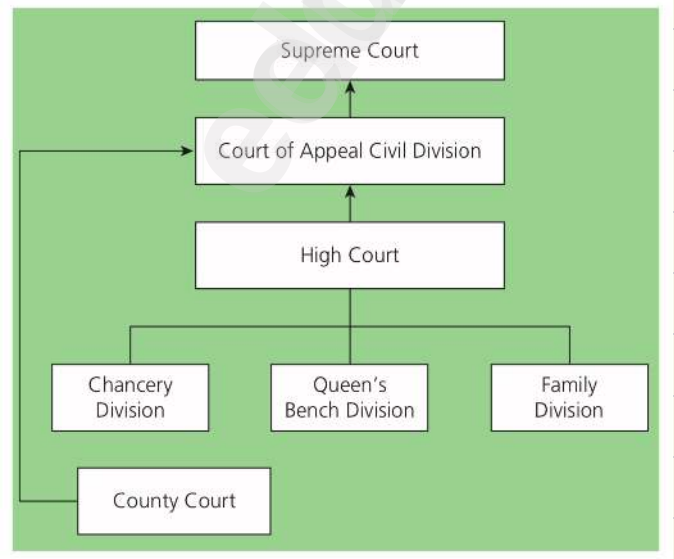
- President: Lord Chief Justice
- over 70 judges sitting in this division
- usually deals with contract and tort cases
- amount claimed is £100,000 and the issues are complex, with the exceptions of personal injury cases, where the claim is over £50,000 (defamation cases)
- Multi-track cases are dealt with in the High Court (too complex)
- High court cases are formal, expensive, and take a long time to come to trial

Chancery Division

- Chancellor of the High Court is the head of the Division
- About 14 High Court Judges
- Involves disputes regarding insolvency, enforcement of mortgages, trust property, copyright and patents, intellectual property, contested probate actions

Family Division

- Was created during The Crime and Courts Act 2013
- Includes divorce, children custody, and maintenance
- Judges come from all levels of judiciary: magistrates, District Judges, Circuit Judges, High Court Judges



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Court of Appeal (Civil Division)

- Main appellate court for civil cases
- Headed by the Master of the Rolls
- Requires permission to appeal in most cases (heared by three judges)
- Grounds of an appeal can be on an error of law by the trial judge, liability, amount of damages awarded

Supreme Court

- Final civil court of appeal
- Hears appeals from the Court of Appeal (by Justices of the Supreme Court)
- 3-5, 7, 9 judges hear the appeal
- Requires permission to appeal from the Supreme court or lower court
- About 70 cases per year with an appeal

The Woolf reforms - present system of civil justice

↳ Based on reforms recommended by Lord Woolf in his report **Access to Justice (1996)**

Lord Woolf stated that a civil justice system should:

- be just in the results it delivers
- be fair in the way it treats litigants
- offer appropriate procedures at a reasonable cost
- deal with cases at a reasonable speed
- be understandable to those who use it
- provide as much certainty as the nature of particular cases allows
- be effective, adequately resourced and organised.

- Found that none of these points were being achieved in the civil courts
  - criticised the system for being unequal, expensive, slow, uncertain, complicated

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His proposals:

- extending the value of small claims from the then limit of £1000 (the present level is £10 000)
- providing a fast track for straightforward cases of moderate value (the present limits are £10 000 to £25 000)
- providing a multi-track for larger claims (now over £25 000)
- encouraging the use of alternative dispute resolution (ADR)
- giving judges more responsibility for managing cases
- making greater use of information technology
- simplifying documents and procedures and having a single set of rules governing proceedings in both the High Court and the County Court
- having shorter timetables for cases to reach court and for lengths of trials.

Advantages of Woolf reforms	Disadvantages of Woolf reforms
• The culture of litigation has changed for the better, with greater co-operation between the parties. • There has been an increased rate of settlement in cases. • Judges are now taking a more active role in managing cases. • There is less delay.	• The main problem of cost still remains. In 2011, the government in their consultation paper, *Solving Disputes in the County Court* pointed out that: – It was 15 years since the Woolf Report and the system had not kept pace with the 'major economic and social shifts that have taken place since'. It believed that the system needed to focus more on dispute resolution and debt recovery, rather than the ideals of 'justice'. – The costs of taking a case to court are often more than the amount claimed. The ideal is that disputes 'should be resolved in the most appropriate forum, so that processes and costs are commensurate with the complexity of the issues involved'.

The Civil Procedure Rules - introduced in 1999, aimed to enable the courts to deal with cases justly and at a proportionate cost

- ensure that parties are on an equal footing
- save expense
- deal with cases in a way that is proportionate to the amount being claimed, the importance of the case (for example is there a major point of law involved?) and the complexity of the case
- ensure that the case is dealt with quickly and fairly
- allocate an appropriate share of the court's resources (so smaller claims do not take up more time than they justify).

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Rule 1.4 of the Civil Procedure Rule explain that judges must

- identify the issues at an early stage
- decide which issues need investigation and trial

Key facts	
Aspects of Woolf reform	**Description**
Courts dealing with civil cases	• County Court • High Court
Different tracks for claims	• Small claims • Fast track • Multi-track
Problems of civil cases	• Cost • Delay • Complexity
Woolf reforms	• Encourage use of ADR • Simpler forms and language • Increased small claims limit • Created fast track for claims of moderate value • Created multi-track for larger claims • Judges responsible for case management • Strict timetables
Advantages of Woolf reforms	• More co-operation between parties • More cases settled • Judges actively managing cases • Cases, especially small claims and fast track, heard more quickly
Disadvantage of Woolf reforms	• Costs too high and may be more than the amount claimed

Applying the rules in court:

- Issues are identified more quickly
- More settled cases
- Encourage use of ADR (alternative dispute resolution)
- Strict timetables (Vinos v Marks and Spencer plc (2000))

Pre-trial procedures

1) Starting a court case - people should try to resolve a dispute first without going to court.

2) Legal advice - a lawyer writes to the other person, possibly leading to a 'bargaining situation.' Contact takes place between parties.

3) Going to court - considering the following issues:

- Is there a valid claim based on a legal issue?
- Does the person or business against whom action is being taken have enough money, or insurance cover, to make them worth suing?
- Are the issues complicated? If so, will a lawyer be needed? Is there good evidence in support of the claim? Is the person claiming prepared to spend time pursuing the claim?
- Is ADR a better option?
- Is the person taking the case prepared to pay an initial court fee and prepared to pay the other side's costs if the claim is lost?
- In tort cases, will a lawyer be prepared to take the claim on a 'no win, no fee' basis?

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4) Filing a claim - sets out the following:

- the claimant's name and address for the sending of court documents
- the defendant's name and address where the claim form is to be sent to
- what is being claimed, for example an amount of money in damages or another remedy such as an injunction
- the grounds for making the claim, showing the relevant law.

~ must be filed at a court office, or online, with an initial fee paid.

Allocation of cases

- Has to decide which court to use (Country Court or High Court)
- ≤ £100,000 ⇒ Country Court
- personal injury claim >≤ 50,000 ⇒ High Court

Value of the claim	Court and track in which the case will usually be tried
Under £10000	County Court small claims procedure
£10000 to £25000	County Court fast track procedure
£25000 to £100000	County Court multi-track procedure
Over £100000	High Court

Small claims track - simple way of making a claim for a small amount of money.

Advantages of using small claims track	Disadvantages of small claims track
• The cost of issuing a claim is low. • The loser will not have to pay the other person's legal costs. • Claimants do not have to use lawyers, but are encouraged to take the case themselves. • The procedure is quicker and simpler than for other tracks. • In the hearing, the District Judge should help the parties to explain their case.	• Legal funding for paying for a lawyer is not available, though it may be possible in a tort claim to fund the case through a 'no win, no fee' arrangement. • Where the other side is a business, it is more likely to use a lawyer. This can put an unrepresented litigant at a disadvantage. • Research has shown that District Judges are not always helpful to unrepresented litigants. • Even if the case is won, it does not mean that the claimant will recover their awarded money from the defendant. Only about 60% of successful claimants actually receive all the money awarded by the court.

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~ Case will be heard by a Circuit Judge

- can set timetables
- can even ask the parties to try an alternative method of dispute resolution

Appeals

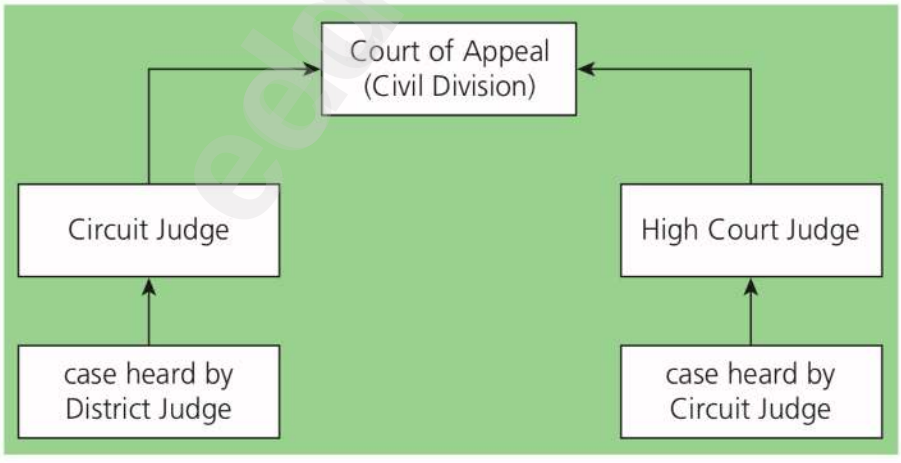
- Heard by the appellate courts from lower courts
- Can be made in a civil case against liability and/or the award - amount of damages
- An appeal court can: confirm or alter the initial decision on liability, confirm, increase or decrease the amount of damages

6.5.1 Appeals from a County Court hearing

- For fast-track cases decided by a Circuit Judge, an appeal is heard by a High Court Judge.
- For final decisions in multi-track cases heard in the County Court, the right of appeal is to the High Court.

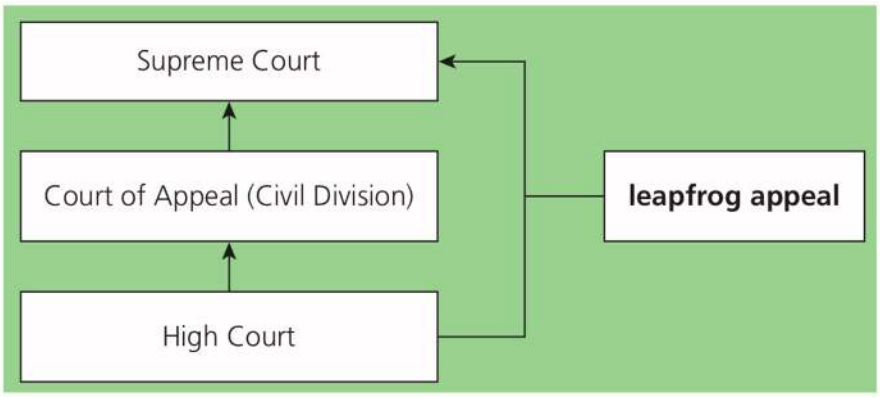
Appeals from a High Court hearing

- may be a 'leapfrog' appeal where cases go directly to the Supreme Court
- must involve an issue that is of national importance
- benefits of going to the Supreme Court must outweigh the Court of Appeal



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▲ **Figure 6.8** Appeal routes from the High Court

▼ **Figure 6.9** Advantages and disadvantages of the civil courts

Advantages	Disadvantages
• The process is fair – everyone is treated alike • The judge is impartial • The judge is a legal expert • Decisions can be enforced through the courts • Appeals are possible against liability and amount of damages awarded • Help with funding may be available in certain cases – very limited legal aid or no win no fee arrangements	• Cost of taking proceedings including loser paying the winner's costs • Delay due to procedures and waiting for hearings • Process is complex usually needing specialist lawyers • Uncertainty of outcome until a final decision is made • Confrontational process, partly due to use of lawyers and having to 'win' or lose the case

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Chapter 4

Alternative methods of dispute resolution

~ As using courts is often costly, more people use ADR

Negotiation

- Involves communicating face to face, over the phone, letters, or email exchange
- Private, quickest, and cheapest method of dispute
- When parties cannot reach an agreement, they may try to involve solicitors, who will try to reach a settlement
- Even during court proceedings, they will try to negotiate on behalf of their clients
- Once lawyers get involved, there will be a cost element, and negotiations no longer take place
- Best to have an agreement signed by both parties when taking cases to court

Conciliation

- Involves a neutral trained person (the conciliator) helping the parties reach a compromise solution
- Can take place at any time before the trial
- Involves consulting each party to see how much common ground there is between them
- Carried out in private where the parties may or may not meet face to face
- Works best when negotiating contracts between companies
- Outcome doesn't have to be strictly legal (based on commercial common sense & compromise)
- Avoids adversarial conflict in the courtroom - everyone wins
- Might not always lead to a resolution

Mediation

- Also involves a neutral trained mediator helping the parties reach a compromise
- Carry offers while keeping confidentiality
- Won't usually tell the parties their own views of the merits of the dispute - act as a 'facilitator'

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- Only suitable if parties are more likely to co-operate
- Parties are in control and can make the decisions
- Conciliators take a more active role in helping the parties than mediators

~ Formalised settlement conference

- Involves a 'mini-trial' where each side presents their case to a decision-making executive from each party and a neutral party
- Will evaluate two sides, if can't decide, the neutral adviser will act as a mediator

~ Mediation services

- Centre for Dispute Resolution, set up in London (1991)
- Cost of a mediator is about £1000 to £1500 a day
- Also free mediation services by volunteers aimed at resolving smaller disputies (noise, car parking, dogs, boundary fence)
- Online dispute resolution (ODR) may also take place

Arbitration

- Governed by the Arbitration act 1996

Section 1 sets out the principles behind it:

'(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.'

- Act only apples to written arbitration agreements
- Parties can make agreements to go to arbitration at any time

~ Scott v Avery - clause in a contract requiring disputes to be resolved through arbitration before taking legal action

- Parties are free to agree to the number of arbitrators (Section 15)
- Can also agree on the procedure for appointing an arbitrator

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The arbitration hearing

- Parties may submit a paper arbitration, and a decision will solely be made on points in writing
- May send all the documents to the arbitrator, and attend a hearing for oral submissions before a decision is made
- When necessary, may call witnesses to give evidence (the act allows for the court procedure to ensure the attendance of those witnesses)
- The parties can choose the most convenient date & time, enhancing flexibility

The award - the decision made by the arbitrator

- Can be enforced through courts, if necessary
- Is usually final, but can be challenged in the courts on the grounds of serious irregularity in the proceedings or on a point of law

Advantages of arbitration	Disadvantages of arbitration
• The parties may choose their own arbitrator, and can therefore decide whether the matter is best dealt with by a technical expert, a lawyer or a professional arbitrator. • An expert in a particular field can be appointed, saving the expense of calling expert witnesses and the time that would be used in explaining all the technicalities to a judge. • The hearing time and place can be arranged to suit parties. • The actual procedure used is flexible and the parties can choose that which is most suited to the situation; this will usually result in a more informal hearing than in court. • The hearing will be in private and there will be no publicity. • The dispute will be resolved more quickly than through a court hearing. • Arbitration proceedings are usually much cheaper than going to court and there is no necessity to instruct lawyers. • The award is normally final and can be enforced through the courts.	• The parties may not be on an equal footing as regards their ability to present their case – such as an individual against a large company. No funding is available for individuals. • An unexpected legal point may arise in the case that is not suitable for decision by a non-lawyer arbitrator. • The fees of a professional arbitrator may be expensive. • It will also be expensive if the parties opt for a formal hearing, with witnesses giving evidence and lawyers representing both sides. • Rights of appeal are limited. • The delays for using a commercial or international arbitrator may be nearly as great as those in the courts.

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▼ **Figure 7.3** Comparing different methods of ADR

Key facts	
Method of dispute resolution	**Who makes the decision?**
Negotiation	The parties themselves
Conciliation	The parties, with the help of a neutral conciliator who plays an active role
Mediation	The parties, with the help of a neutral mediator
Arbitration	The arbitrator

▼ **Figure 7.4** Advantages and disadvantages of different methods of ADR

	Advantages	Disadvantages
Negotiation	• Quick and straightforward • No cost • Parties in control	• Parties may be unwilling to negotiate • Involving lawyers can be expensive • It may fail requiring court action as a last resort
Conciliation	• Cheaper than a court case • Parties have some control • Can include agreements about future business	• Conciliator may force a resolution • May not lead to settlement • Not always binding
Mediation	• Cheaper than a court case • Parties in control • Can include agreements about future business	• May not lead to settlement • Not binding • One party may not engage in process
Arbitration	• Cheaper than a court case • Decision is final and binding • Decision can be enforced in the courts	• More expensive than other forms of ADR • Can be formal • Not suitable if a point of law is involved

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Chapter 8

Criminal courts & criminal process

~ Magistrates' Court & Crown Court - hear trials of criminal cases

↙ least serious summary offenses

↘ most serious indictable offences

Magistrates' Court

- about 160 courts in England and Wales
- Were established as local courts, so used to be in most towns
- Big cities used to have several courts
- Severe closures, making large distances between each court
- Cases are heard by Magistrates - may or may not be qualified District Judges

Magistrates' Courts have the following jurisdiction:

1. To try all summary cases
2. To try any triable-either-way cases that can be dealt with in the Magistrates' Court
3. To deal with the first hearing of all indictable offences; these cases are then immediately sent to the Crown Court
4. To deal with all preliminary matters connected to criminal cases, such as issuing warrants for arrest and deciding bail applications
5. To try cases in the Youth Court where the defendants are aged 10–17 inclusive.

Crown Court

- about 84 different locations throughout England and Wales
- all pre-trial matters are heart by a judge alone
- when a defendant pleads guilty, the sentence is decided by a judge alone
- when pleads not guilty, the jury decides the verdict

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▼ **Figure 8.1** The parties to a criminal case

Key facts	
Party	**Description**
Prosecution	The Crown Prosecution Service (CPS) initially advises the police on what offence to charge. Lawyers work for this service. They may direct the police on what evidence is required. It will be for the police to obtain the evidence. Once the case comes to court, it presents the case and tries to prove the defendant guilty beyond reasonable doubt.
Defendant	This is the person charged with a criminal offence. They do not have to disprove the prosecution case but to cast sufficient doubt on it.

Classification of criminal offences

Summary offences

- least serious criminal offences - have to be tried in the Magistrates' Courts
- Subdivided into different severity levels (1-5)

~ Level 1: £200

~ Level 2: £500

~ Level 3: £1000

~ Level 4: £2500

~ Level 5: unlimited

- Examples include: driving while disqualified, common assault, being drunk in public, theft, shoplifting goods that are less than £200

Triable-either-way offences

- Can be tried in either court
- Include physical assault, theft, and burglary
- Same procedure as for trial of a summary offence

Indictable offences

- Most serious offences - tried only in the Crown Court
- First preliminary hearing establishes the defendant's identity - in the Magistrates' Court
- After this, all matters take place in the Crown Court
- Pleads not guilty - jury decides after hearing all the evidence

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- A judge can impose any sentence up to the maximum set by the Act that imposes the offence. (murder, manslaughter, robbery)

Pre-trial processes

Summary offences

- The court checks the defendant's name and address
- The defendant then pleads guilty / not guilty
- Over 90% plead guilty in the Magistrates' Court
- Establish appropriate penalty

~ Guilty plea

The usual sequence of events is as follows:

1 The Crown Prosecutor will give the court an outline of the facts of the case.

2 The defendant is asked to agree with those facts. If they are not agreed, the magistrates may have to hold an inquiry, called a Newton hearing, to establish the facts.

3 The defendant's past record of convictions, if any, is given to the court.

4 Other information about the defendant's background (residential, relationship and especially financial) is given to the court.

5 Any relevant reports are considered by the magistrates; these may include a pre-sentence report prepared by a probation officer and/or a medical report on the defendant's mental health.

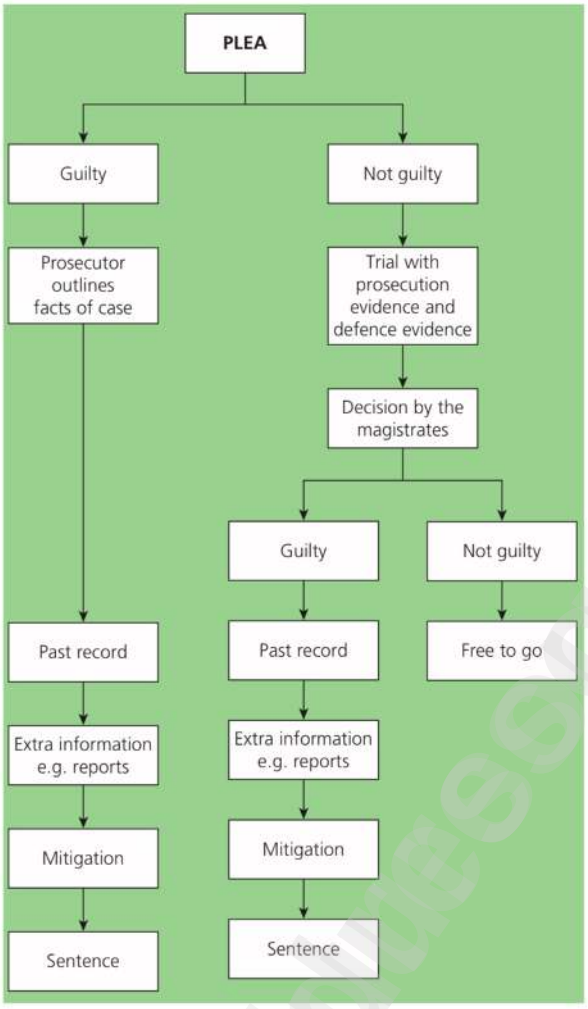
6 The defendant or any defence lawyer can then explain any matter that might persuade the magistrates to give a lenient sentence. This is called making a speech in mitigation.

7 The magistrates decide the sentence.

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Key facts	
Type of offence	**Description**
Summary offences	The least serious offences that are tried in the Magistrates' Court
Triable-either-way offences	More serious offences which can be tried in either the Magistrates' Court or the Crown Court – usually at the option of the defendant
Indictable offences	The most serious offences which have to be tried in the Crown Court



Key facts	
Proof	**Description**
The burden of proof	This is on the prosecution to show that each and every aspect of the allegation is proved.
Beyond reasonable doubt	This is the level of proof that the prosecution must show that the defendant is guilty. It is a high standard, as the consequences of a guilty verdict are severe.

Not guilty plea

- Prosecution makes a short speech about the merits of the case
- Prosecution's witnesses are called and are questioned by the prosecutor - examination in chief
- The defence cross-examines the witnesses to test the evidence
- The prosecution may produce exhibits to help establish their case
- At the end of the prosecution case, the defence can submit to the magistrates that the case should be dismissed
- The defence may give their evidence to court after the magistrates go through with the case
- The defendant usually gives evidence (not obligated)
- Criminal Justice and Public Order Act (1994) - the magistrates can draw their own conclusions from the fact that the accused stays silent
- If the evidence is given, the defence may make a speech pointing out the weaknesses of the case

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▼ Figure 8.4 Proof in criminal cases

Key facts	
Proof	**Description**
The burden of proof	This is on the prosecution to show that each and every aspect of the allegation is proved.
Beyond reasonable doubt	This is the level of proof that the prosecution must show that the defendant is guilty. It is a high standard, as the consequences of a guilty verdict are severe.

Tribal - either-way offences - may be tried in either the Magistrates' Court or the Crown Court (Section 8.2.2)

~ if the defendant is found guilty in the Magistrates' Court, the magistrates have the power to send them to the Crown Court for sentencing
- can only happen at the end of a case, having heard the defendant's past record

Indictable offences

- Most serious offences - have to be dealt with the Crown Court
- The defendant will be first sent to the Magistrates' Court after charge for identity confirmation and for bail & custody to be decided
- s 51 Crime and Disorder Act 1998 - a defendant charged with an indictable offence will be transferred to the Crown Court immediately from their first hearing
- All pre-trial matters are heard by a judge alone
- Pleads guilty - judge decides the sentence alone, not guilty - a jury decides if not
- The Criminal Procedure Rules - deal with all aspects of ciminal cases

Plea and Trial Preparation Hearing (PTPH)

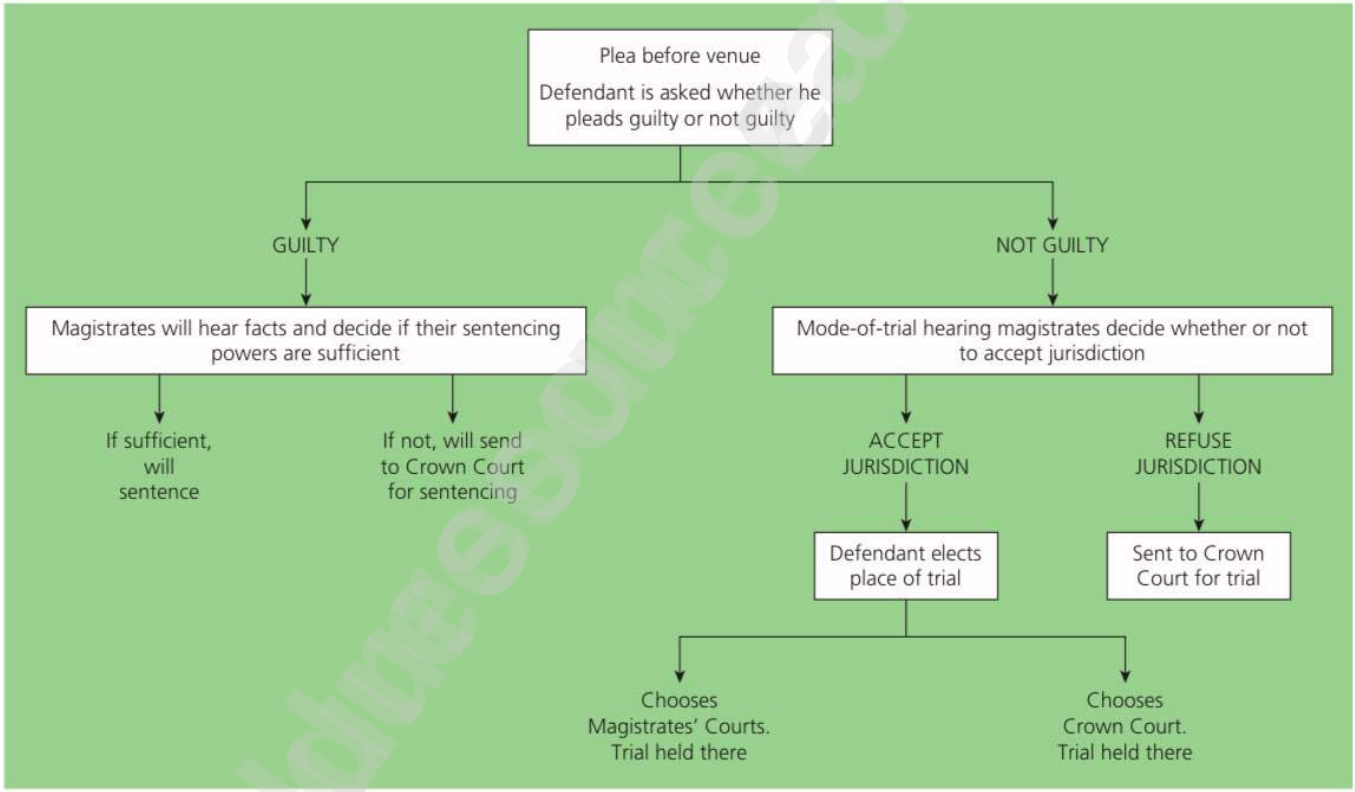
- Takes place at the Crown Court ASAP after the case has been sent from the Magistrates' Court

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An effective PTPH will:

- arraign the defendant (take the defendant's plea), unless there is good reason not to set the trial date
- identify, so far as can be determined at that stage, the issues for trial
- provide a timetable for the necessary pre-trial preparation and give appropriate directions for an effective trial
- make provision for any Further Case Management Hearing (FCMH) that may be required, to take place at the time when it can have maximum effectiveness.



▲ **Figure 8.5** Procedure for triable-either-way offences

The indictment

- A final document prepared before trial that formally sets out the charges against the defendant

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Disclosure by prosecution and defence

- Both parties must disclose certain points to one another before the trial
- The prosecution must set out all the evidence and disclose previously undisclosed material

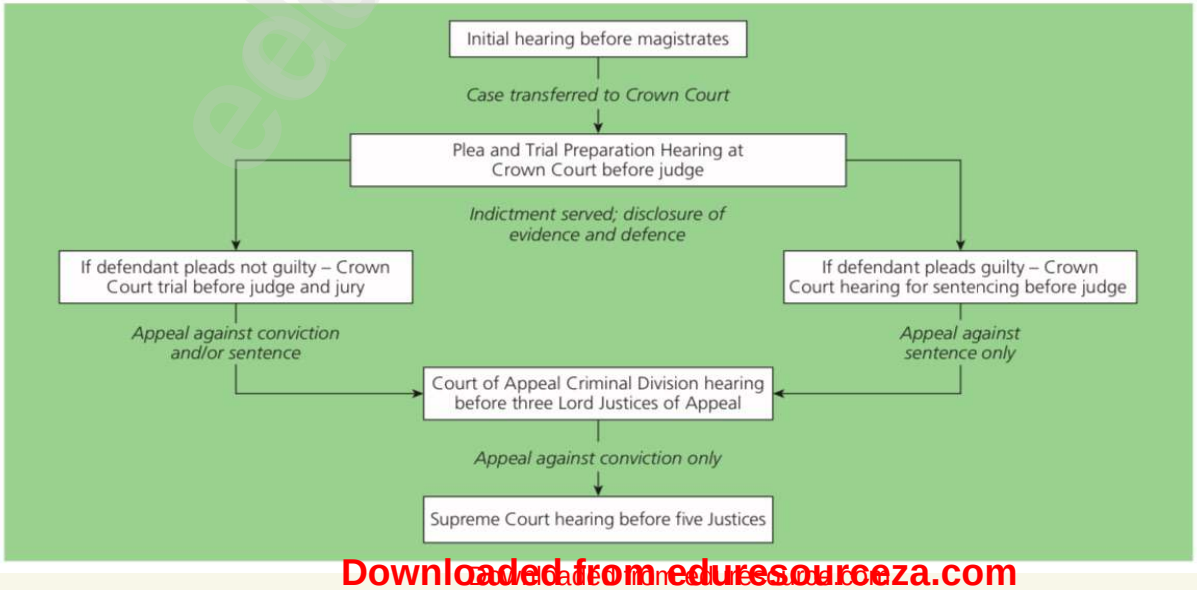
'... which in the prosecutor's opinion might reasonably be considered capable of undermining the case for the prosecution against the accused.'

The defence must provide a written statement to the prosecution that contains:

- the nature of the accused's defence, including any legal defences intended to be relied on
- any matters of fact on which issue is taken with the prosecution
- any point of law to be argued, and the case authority in support
- any alibi, and the witnesses to support that alibi (this information allows the prosecution to run police checks on the alibi witnesses).

Figure 8.6 Advantages and disadvantages of courts hearing triable either way offences

	Advantages	Disadvantages
Magistrates Court	• Trial taking place in (relatively) local court • Less chance of publicity • Case will be heard quickly • Shorter trial • Lower sentencing powers of magistrates • Greater chance of bail being granted before trial	• Less likelihood of legal representation • Less ability to argue a defence or challenge witnesses • Greater chance of being found guilty • Less chance of appealing against conviction and/or sentence
Crown Court	• Greater chance of acquittal by jury or judicial direction • Greater chance of prosecution accepting plea to lower charge • Greater chance of witnesses not attending • Defence to charge can be fully argued • Greater chance of receiving legal aid • Chance of appeal against conviction and/or sentence	• Takes longer for case to reach court • Greater chance of publicity • May not be tried locally • Sentencing powers of judge are greater • Likely to need legal advice and representation • Longer trials may involve greater expense • Lower chance of being granted bail before trial



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Appeals

~ From the Magistrates' Court to the Crown Court

- If pleads guilty at the Magistrates' Court, an appeal can only be made against sentence
- The Crown Court can either confirm the sentence or increase / decrease it
  - ↙ up to the max powers of the case
- If pleaded not guilty and is convicted, can make an appeal against conviction or sentence

Case-stated appeals

- Appeals on a point of law that go to Queen's Bench Divisional Court
- Can be either directly from the Magistrates' Court or following an appeal to the Crown Court
- Can be used by both prosecution and defence
- The magistrates are asked to state the case - setting out their findings of fact & their decision
- Appeal can be argued on the basis of law & facts - cannot call witnesses
- Usually heard by two or three judges
- On the basis that the magistrates made a wrong decision / mistake
- The Divisional Court may confirm, alter, or send the case back

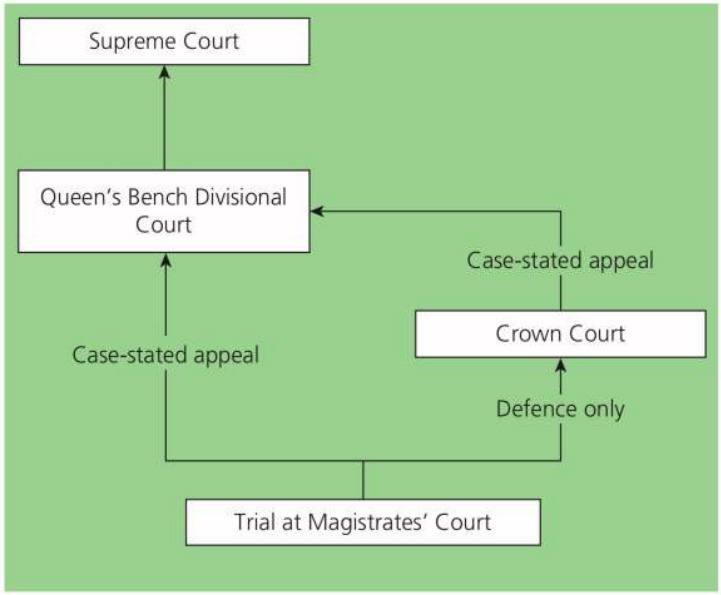
~ C v DPP (1994)

CASE EXAMPLE

C v DPP (1994)

A 13-year-old boy had been convicted in the Magistrates' Court of the offence of interfering with a motorcycle with intent to commit theft or to take and drive away without consent. An appeal by case stated concerned a legal point about the presumption of criminal responsibility of children between the ages of 10 and 14. Until this case, it had been accepted that such a child could only be convicted if the prosecution proved that the child knew they were doing wrong. The Divisional Court held that times had changed and that children were more mature and the rule was not needed.

The case was further appealed to the House of Lords who overruled the Divisional Court, holding that the law was still that a child of this age was presumed not to know they were doing wrong, and therefore not to have the necessary intention for any criminal offence. The original conviction was confirmed.



▲ **Figure 8.8** Appeal routes from the Magistrates' Court

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Appeals from the Crown Court

- By a defendant - can appeal against conviction / sentence to the Court of Appeal
- Leave to appeal - the Criminal Appeal Act requires the defendant to obtain leave to appeal
- The Criminal Appeal Act (1995) - the Court of Appeal can allow an appeal 'if they think that the conviction is unsafe'
- After the incorporation of the European Convention on Human Rights, the interpretation of 'unsafe' is broad (now is held to be 'unsafe' where the defendant has been denied a fair trial
- New evidence must appear to be able to afford a ground for an appeal (admissable)

Court of Appeal's powers

The Court of Appeal can:

- allow a defendant's appeal and quash a conviction, or
- vary the conviction to that of a lesser offence of which the defendant could have been convicted, and/or
- decrease, but not increase, any sentence imposed
- dismiss the appeal
- order that there should be a retrial of the case in front of a new jury.

Appeals by prosecution

The prosecution has limited rights to appeal against an acquittal as follows:

1 Where the acquittal was the result of the jury being 'nobbled'. This is where one or more jurors are bribed or threatened by associates of the defendant.
2 Where there is new and compelling evidence of the acquitted person's guilt, and it is in the public interest for the defendant to be retried. This power is given by the Criminal Justice Act 2003 and it is only available for some 30 serious offences, including murder, manslaughter, rape and terrorism offences. It is known as 'double jeopardy', since the defendant is being tried twice for the same offence. The Director of Public Prosecutions has to consent to the reopening of investigations in the case.

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CASE EXAMPLE

Stephen Lawrence

In 2011, two defendants who had been previously acquitted of the murder of black teenager Stephen Lawrence were retried using the double-jeopardy rules and convicted some 19 years after the murder. Part of the new evidence was a DNA match with Stephen's blood, found on the clothing of one of the defendants. This evidence became available due to improved DNA testing techniques.

CASE EXAMPLE

Michael Weir

Michael Weir was jailed for life for the murders of two pensioners in a case that broke new legal ground. He was convicted 20 years after the killings in a unique double-jeopardy case. His original murder conviction was thrown out on appeal on a technicality when prosecutors were late filing legal papers, despite DNA evidence from a glove found at the scene linking him to one of the attacks. By 2018, new DNA evidence linking him to both murders had been discovered. Weir was the first defendant to be found guilty of the same murder twice.

Referring a point of law

- s 36 Criminal Justice Act - the Attorney-General can refer a point of law to the Court of Appeal, in order to get a ruling on the law
- Creates precedents for future cases

Against sentence

- s 36 Ciminal Justice Act - Attorney General can apply for a lenient sentence to the Court of Appeal
- cases are brought by the Crown Prosecution Service
- membess of the public may appeal as well

Further appeals

- Prosecution / defence may appeal from the Court of Appeal to the Supreme Court
- Must certify a point of law of general public importance
- Can only be made against conviction or acquittal

The Ciminal Cases Review Commission

- Established by the Ciminal Appeal Act (1995)
- Can investigate possible miscarriages of justice and refer cases back to courts
- Must normally have already been an appeal to the Court of Appeal (unless exceptional circumstances)

Police bail: PACE 1984 & the Ciminal Justice and Public Order Act 1994

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Bail

- A person can be released on bail at any point after arrest
- Means allowed to be at liberty until the next stage in the case (part of the human right)
- Must be available even for serious offences (may restrict some rights in special circumstances)

Police powers to grant bail

- May release a suspect on bail before any charge is brought - released from police custody on possible imposed conditions
- May give bail after has been charged with an offence - accused is bailed to appear at a Magistrates' Court on a set date
- Decision about granting bail is made by the custody officer under s 38 PACE - Criminal Justice and Public Order Act (1994)
- Can also refuse bail if the suspect's name and address cannot be discovered
- The Bail Act 1976 sets out which principles apply as to when bail should be granted
- The police can arrest and charge the suspect if they fail to surrender to the bail (attend the next stage of the case

Conditional bail

The Criminal Justice and Public Order Act 1994 gave the police the power to impose conditions on a grant of bail. The types of conditions include:

- living at a certain address
- surrendering a passport
- reporting at regular intervals to the police station
- getting another person to stand surety.

These conditions can only be imposed in order to make sure that the suspect:

- surrenders to bail
- does not commit an offence while on bail
- does not interfere with witnesses
- does not interfere in any other way with the course of justice.

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No police bail

- Where the police are not prepared to allow bail, they must bring the accused to the Magistrates' Court at the first possible opportunity
- Must make the decision themselves if the magistrates cannot deal with the whole case at the first hearing

Release under investigation (RUI)

- The police continues their investigations and recalls a suspect when a decision is made as to whether to charge or not
- Introduced in 2017

Bail from the court

- The Bail Act 1976
- Section 4 gives a general right to an accused to be granted bail
- Court may refuse to grant an accused bail if there are substantial grounds for believing that the accused would:
  - ~ fail to surrender to custody
  - ~ commit an offence while on bail
  - ~ interfere with witnesses - obstruct the course of justice
- May also refuse bail if it is satisfied that the accused should be kept under custody for their own protection
- If a court grants bail but the accused fails to appear when needed, they can issue a warrant for an arrest
- The prosecution has the right to appeal to a judge in the Crown Court against the decision of granting bail

In deciding whether to grant bail, the court will consider various factors, including the:

- nature and seriousness of the offence (and the probable method of dealing with it)
- character, antecedents (that is, past record), associations and community ties of the accused
- accused's past bail record (if any)
- strength of the evidence against the accused.

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~ Under a new s 5A of the Bail Act 1976, an accused 18+ that's unlikely to be sentenced if convicted must be granted bail (enacted by LASPO 2012)
~ If an accused is charged with an offence that is not punishable by imprisonment, bail can only be refused if they had previously failed to surrender to bail
~ court can make conditions for the granting of bail
~ police may make similar conditions (eg: surrender of passport / report to the station)
~ court may pick a location for the accused to reside while on bail

Renewed applications and appeals

- One further bail application may be made after refusal of bail (unless special circumstances)
- The accused can appeal to a judge at the Crown Court

▼ **Figure 8.10** Bail

Key facts	
Who can grant bail?	• The police • Magistrates • Crown Court
Bail Act 1976	There is a presumption in favour of bail. However: • For an offence while already on bail, bail can only be given if the court is satisfied there is no significant risk of further offending. • There must be exceptional circumstances for bail to be granted for murder, attempted murder, manslaughter, rape or attempted rape where the defendant has already served a custodial sentence for such an offence.
When can bail be refused?	Bail can be refused if there are reasonable grounds for believing the defendant would: • fail to surrender • commit further offences • interfere with witnesses.
Conditions that can be imposed	• Sureties • Residence in bail hostel • Curfew • Surrender of passport etc.
Comment	• Some of those in prison are awaiting trial and could have been given bail. • There is the problem of balancing bail against the need to protect the public.

▼ **Figure 8.11** Advantages and disadvantages of bail in criminal justice

Advantages of bail	Disadvantages of bail
• Accused is innocent until found guilty and should not be held in custody while innocent • Accused can gather evidence and witnesses to support defence; unrestricted access to legal advice • Conditions can be attached to ensure good behaviour and some control over accused • Accused can continue living with family and in work	• Accused may interfere with witnesses and/or evidence • Accused may abscond before trial • General public not protected if bail is granted • Accused may commit further offences

run off

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'Factors and conditions for bail

1) **Sureties** - a person who is prepared to pay the court if the accused fails to attend court

2) **Repeat serious offences** - where an accused is charged with (attempted) murder, manslaughter, (attempted) rape and have already served their sentence for a similar offence, the court may not grant bail (unless special circumstances)

3) **Offence committed while on bail** - under s 14 of the Criminal Justice Act 2003, when an accused commits a further offence while on bail, the Bail Act 1976 states:

He may not be granted bail unless the court is satisfied that there is no significant risk of his committing an offence on bail (whether subject to conditions or not).'

4) **Restrictions on bail for adult drug users**

Section 19 of the Criminal Justice Act 2003 amended the Bail Act 1976 to place restrictions on bail for adult offenders who have tested positive for specified Class A drugs where:

- the offender is charged with either possession or possession with intent to supply a Class A drug, or
- the court is satisfied that there are substantial grounds for believing that the misuse of a Class A drug caused or contributed to the offence, or that the offence was motivated wholly or partly by the intended misuse of such a drug, and
- the defendant has refused to agree to participate in an assessment or follow-up in relation to their dependency upon or propensity to misuse specified Class A drugs.

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Chapter 9

Police powers

~ The police investigates reported crimes

- the investigations are controlled, with rules on how to carry out arrests & detain/question suspects

Police and Criminal Evidence Act 1984

- The police must respect an individual's civil rights
- The public is entitled to be able to move freely and have their property respected
- However, the police has powers to: stop suspects in the street & search them, to arrest, detain and interview suspects, take fingerprints & other samples (when necessary)
- Important that the police don't abuse their powers to unnecessarily harass people

Police and Criminal Evidence Act 1984 (PACE) and the Codes of Practice under s 66 include eight codes on the law on police powers (A-G)

- Code A deals with the power to stop and search
- Code C deals with the detention, treatment and questioning of suspects
- Code E deals with recording interviews with suspects
- Code F deals with visual recording of interviews (that is, videoing interviews)
- Code G deals with police powers of arrest
- Code H has rules relating to the detention, treatment and questioning of suspects arrested under s 41 of the Terrorism Act 2000.

Stop and search

- Section 1 - gives them the right to stop and search individuals & vehicles in public places
- Must have reasonable grounds for suspecting that they will find stolen or prohibited articles
- s 2(9) - if a search is carried out in public, the police can only request that the suspect removes their outer coat, jacket, and gloves
- A written record of the search (purpose, grounds, result) must be made ASAP after it

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Code of Practice A

- Details on when stop and search powers should be used
- Must not act solely on a person's character or behaviour
- Paragraph 2.2 B of the Code says: 'Reasonable suspicion can never be supported on the basis of personal factors'
- Reasonable suspicion cannot be based on stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity
- Prohibits the search that involves exposure of intimate parts of the body
- Where there is religious sensitivities about removing face coverings, the officer should allow the item to be removed out of public view and in presence of an officer of the same gender

Stop and search under s 23 of the Misuse of Drugs Act 1971

- Officer may stop and search a person/vehice under reasonable grounds of suspicion that they're in possession of a controlled drug
- Include class A (cocaine & methadone), Class B (cannabis & amphetamine), class C (diazepam)
- Random searches are not authorised
- Must make a written record ASAP

Stop and search under the Terrorism Act(2000)

- Police officer may stop and search a person, possessions, or vehicle under s43(1) if they reasonably suspect that the suspect is a terrorist
- May be used at any time/place & no authorisation required

Arrest

- Section 24 PACE allows the police to arrest a suspect without a warrant

A constable may arrest, without a warrant, anyone:
- who is about to commit an offence
- who is in the act of committing an offence
- whom the constable has reasonable grounds for suspecting to be about to commit an offence
- whom the constable has reasonable grounds for suspecting to be committing an offence.

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- anyone who is guilty of the offence
- anyone whom they have reasonable grounds for suspecting to be guilty of it

TIMING	EVENT	SECTION
PAST Actual offence	anyone who is guilty of the offence	24(3)(a)
	anyone whom the constable reasonably suspects to be guilty	24(3)(b)
PAST Suspected offences	where a constable has reasonable grounds for suspecting that an offence has been committed, they can arrest anyone whom they reasonably suspect to be guilty of it	24(2)
PRESENT	anyone who is in the act of committing an offence	24(1)(b)
	anyone whom the constable has reasonable grounds for suspecting to be committing an offence	24(1)(d)
FUTURE	anyone who is about to commit an offence	24(1)(a)
	anyone whom the constable has reasonable grounds for suspecting to be about to commit an offence	24(1)(c)

May arrest a person for the following reasons when necessary:

- to establish the name and address of the person
- to prevent the person suffering or causing physical injury to themselves or any other person
- to prevent the person causing loss of, or damage to, property, or committing an offence against public decency, or obstructing the highway
- to protect a child or other vulnerable person
- to allow the prompt and effective investigation of the offence or of the conduct of the person in question
- to prevent the person disappearing.

Code of Practice G

2.1) Requires a person's involvement in the commission of a ciminal offence & reasonable grounds for believing that their arrest is necessary

2.2) The arrested person must be informed of their arrest

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Manner of arrest

- Must tell the person that they're under arrest and the reason for it
- When necessary, an officer may use reasonable force to make an arrest

CASE EXAMPLE

Taylor v Chief Constable of Thames Valley Police (2004)

The Court of Appeal held that the test of whether the words of arrest were sufficient is: 'Was the person arrested told, in simple non-technical language that they could understand, the essential legal and factual grounds for their arrest?'

Taylor was a ten-year-old boy who had been throwing stones during an anti-vivisection protest. When he was present at a later protest, he was identified by a police officer who said: 'I am arresting you on suspicion of violent disorder on 18 April, 1998 at Hillgrove Farm.' The Court of Appeal held that this was understandable, and so there was a lawful arrest.

The right to search an arrested person

- The police may search for anything that might be evidence relating to an offence

Detention and treatment of suspects at police stations

- ss 56 & 58 PACE 1984 and Codes of Practice C, E, F, H
- rules with time limits on how long the suspect may be detained & how to treat them

Time limits on detention

- A suspect may be detained for 24 hours
- Must charge afterwards or review the detention in custody in no longer than 6 hours
- If at any time the custody officer becomes aware that there are no grounds for continuing the detention, they are obligated to immediately release them from custody
- While kept in custody, the officer must keep a record of all events that occur

Rights of a detained person

» ***having someone informed of the arrest*** (s 56 PACE)

» ***being told that independent free legal advice is available and being allowed to consult privately with a solicitor***

» ***being allowed to consult the Code of Practice.***

The arrested person can nominate any person close to them to be informed about the arrest

- the person must be informed about the arrest & location
- must be informed immediately, with delays being up to 36 hours in special circumstances

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~ Code C states that a detained person should also be allowed to speak on the telephone 'for a reasonable time to one person'

• if under 18, the police must contact a person 'responsible for his welfare'

Key facts		
Right	**Source**	**Comment**
To have someone informed of the detention	s 56 PACE	Can be delayed for up to 36 hours for an indictable offence
To speak to someone on the telephone	Code of Practice C	Not compulsory – police can refuse
To be told of the right to legal advice	Code of Practice C	Notices displayed in police stations Duty of custody officer to bring this to the suspect's attention
To legal advice	s 58 PACE	Can be delayed for up to 36 hours for an indictable offence but only in exceptional circumstances – *R v Samuel*
To have an appropriate adult present at interview	Code of Practice C	Applies to those under 18 and also to people with mental illness or learning difficulties – *R v Aspinall*
To consult the Codes of Practice	The Codes of Practice	

CASE EXAMPLES

R v Samuel (1988)

The defendant was a 24-year-old man, whose mother had already been informed of her son's arrest some hours before he was refused access to a solicitor.

The Court of Appeal felt that if anyone was likely to be alerted then it would already have happened, and that there was no reason to deny Samuel his 'fundamental freedom' of consulting a solicitor. As his final interview with the police had taken place after his solicitor had been refused access, the evidence of what was said at that interview was inadmissible in court and so Samuel's conviction for robbery was quashed.

R v Grant (2005)

The Court of Appeal held that the court would not tolerate illegal conduct by the police. In this case, there had been deliberate interference by the police with the detained suspect's right to privileged communication with his solicitor. This was such a serious abuse of process that it justified his conviction for murder being quashed.

Police interviews of suspects

• Code E = audio recording, Code F = visual recording

• Any detained person may be questioned in a formal interview (must be recorded)

• Issue: questioning of the suspect starts before they arrive at the police station & these informal interviews are not recorded - challenge of evidence

• Any informal confessions should be put into the recorded interview to allow the suspect to make official comments about it.

• Suspects have the right to have a solicitor present at any interview

• If don't ask for one, the police may conduct the interview without one being present

• If the solicitor is delayed, the police have a right to start questioning before their arrival

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R v Halliwell (2012) - a defendant's informal confession was not admissible as he wasn't cautioned or provided a solicitor after explicitly requesting for one.

Appropriate adult

- Underage or mentally vulnerable suspects must have an 'appropriate adult' present during all interviews
- **R v Aspinall (1999)** - Court of Appeal ruled that a defendant who suffered from schizophrenia should have had an adult present during the interview. Although the defendant appeared to be able to understand the questions, the interview was inadmissible as evidence

Treatment of suspects & exclusion of evidence

- **Code of Practice C** - protects the suspects who are being questioned in regard to the physical conditions of the interview: adequate light, heat/ventilator, breaks for meals, refreshments, and sleep
- Monitored by the custody officer (length & timing of interviews)
- **Section 76 PACE** - statements aren't allowed to be obtained through oppression

Searches, fingerprints, and body samples

- When held at a police station, the police do NOT have automatic rights to search the suspects
- Have to record everything a person has with them when they arrive
- Under ss 54 & 55 PACE, searches are authorised when necessary
- Adult arrest on drug suspense - may take urine samples to establish any Class A
- Strip searches - Code C 'involving the removal of more than outer clothing'. Must be made only when necessary, in private, and by a member of the same sex

Intimate searches

- Authorised under s 62 PACE if there is reason to believe that the suspect has with them that could be used to harm themselves or others

An intimate search is defined as 'a search which consists of the physical examination of a person's body orifices other than the mouth'.

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- Drug related searches may only be carried out by a suitably qualified person

There are different rules for intimate samples. These are defined as:

(a) a sample of blood, semen or any other tissue fluid,
urine or pubic hair

(b) a dental impression

(c) a swab taken from any part of a person's genitals or
from a person's body orifice other than the mouth.

- can only be taken by a registered medical practitioner / nurse
- may be checked against information held on other crimes
- s 61 PACE allows the police to take fingerprints and non-intimate body samples (hair, saliva) without consent during detention

Interviews

- Prior to the interview, has to be established that the suspect is fit to be interviewed
- s 60 & s 60A PACE, room should have audio-recording device (and some video recording)
- At the start of every interview, suspect should be reminded that they are under caution
- During the interview, officers may ask any questions they consider appropriate
- The suspect is free to answer, remain silent or reply 'no comment'
- Can also make a written statement under caution instead of / in addition to oral

Right to silence

- ss 34-39 of the Criminal Justice and Public Order Act (1994) limits the right to silence by allowing interpretations to be made from it

~ Wording of caution states:

'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'

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Legal advice

- Code of Practice C entitles the suspect to legal advice (either face-to-face or by telephone)
- A solicitor advising a young / vulnerable person may recognise that the evidence against them is very weak, thus suggesting to remain silent
- R v Beckles (2004) - a jury should be told that no adverse interference should be drawn where a defendant 'genuinely and reasonably relies on a solicitor's advice to remain silent in an interview

Role of the custody officer

- While in detention, every suspect must be under care of the custody officer, who must ensure that all the provisions of Code C are observed by all officers

The custody officer must under Code C:

- see every arrested person when they are brought to the police station and open a custody record which notes the times of detention, breaks and interviews and records their possessions (s 76 PACE)
- authorise and record any search
- ensure that the suspect is offered legal advice, an appropriate adult or interpreter as appropriate and to have someone informed of their arrest and detention
- ensure that the suspect is given any necessary medical treatment and kept safe and secure during the whole of their detention
- ensure that the suspect is fit for interview
- ensure that detention time limits are kept
- when a suspect is charged, ensure that the suspect understands the charge, and make a decision on whether the suspect should be granted bail (and any conditions) or detained in custody.

Impact of the breach of the rules concerning police powers

~ Stop & search

- For a search to be lawful, the police officer must identify themselves, the police station where they are based, and the reason for the search
- Osman v DPP (1999) - The Queen's Bench Divisional Court held that the search was unlawful

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- Michaels v Highbury Corner Magistrates' Court (2009) - Michael's conviction had been quashed by the Queen's Bench Divisional Court, as the officers had not given their names or station before asking him to open his mouth

Arrest

- Article 5 ECHR requires a lawful arrest to bring a person before a competent authority on suspicion of having committed an offence
- s 28 (3) PACE, no arrest is lawful unless the arrested person is given proper grounds

Detention

- Article 5 ECHR requires a lawful detention before bringing a person in
- Article 6 requires a fair trial with a presumption of innocence
- Section 76 PACE makes evidence confessions that are obtained through oppression inadmissible

Key facts			
Power	**Sections in PACE**	**Code of Practice**	**Comments**
Stop and search	Sections 1–7 PACE	A	• Must be in a public place • Must have reasonable grounds for suspecting they will find stolen or prohibited articles
Arrest	Section 24 PACE		• Must have reasonable grounds for suspecting involvement in offence AND • Must have reasonable grounds for believing arrest is necessary
Detention	Sections 34–46 PACE	C	Time limits: • 24 hours for summary offence • 36 hours for indictable offence (can be extended to 96 hours for serious offences) Detainee's rights: • have someone told • be told of availability of legal advice • to see Code of Practice
Interviewing	Section 53 PACE	E	• Police must caution at start of every session • Should tape and/or video-record interview • An appropriate adult should be present for people aged under 18 or with mental illness or leaning difficulties • Legal adviser can be present • Appropriate breaks must be allowed
Searches	Sections 54 and 55 PACE	C	Intimate search must be carried out by person of the same sex
Fingerprints	Section 61 PACE		Reasonable force can be used to obtain prints
Samples	Sections 62 and 63 PACE		• Intimate samples must be taken by person of the same sex • Adverse inferences can be drawn of refusal

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Chapter 10

The judiciary - superior & inferior judges

~ Judges are also known as 'the judiciary'

Different levels of judge:

- Superior judges - High Court Judges and above
- Inferior judges - Circuit Judges and below

Qualifications

- Must meet the judicial appointment eligibility conditions relevant to that level
- Legal qualification and have gained experience in law for a certain period

▼ **Figure 10.1** Qualifications and role of judges

Key facts			
Court	**Judge**	**Qualification**	**Role**
Supreme Court	Justices of the senior court	• 15-year Supreme Court qualification or hold high judicial office • Barrister or solicitor	• Hear appeals on points of law • Civil and criminal cases
Court of Appeal	Lords Justices of Appeal	• 7 years' legal experience or be an existing High Court Judge • Barrister or solicitor	• Hear appeals • Criminal cases against conviction and/or sentence • Civil cases on the finding and/or the amount awarded
High Court	High Court Judges	• Barrister or solicitor • 7 years' legal experience OR • Be a Circuit Judge for 2 years	• Sit in one of the three Divisions • Hear first-instance cases and decide liability and remedy • Some appeal work
Crown Court	• High Court Judges • Circuit Judges • Recorders	• See above • 7 years' legal experience or be a Recorder or District Judge for 3 years • Barrister or solicitor • 5 years' legal experience	• Try cases with a jury • Decide the law • Pass sentence on guilty defendants
County Court	• Circuit Judges • District Judges	• See above • Barrister or solicitor • 5 years' legal experience	• Civil cases – decide liability and remedy • District Judges hear small claims
Magistrates' Courts	District Judges (Magistrates' Courts)	• Barrister or solicitor • 5 years' legal experience • NB CILEx Fellows can be appointed as Deputy District Judges	• Criminal cases – decide law and verdict • Pass sentence on guilty defendants • Some family work

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Selection and appointment (The Judicial Appointments Commission)

- Responsible for selecting 500 people yearly
- Advertises its selection exercises on its website through social media
- For superior-level judges, the commission selects a candidate and recommends them to the Lord Chancellor (accepts/rejects/asks to reconsider)
- Under s 94 c Constitutional Reform Act 2005- secondary legislation has the power to reject a candidate. The Lord Chancellor must have an agreement of the Lord Chief Justice before deciding the outcome
- All judges below High Court are appointed by the Lord Chief Justice

Process for appointing judges

- Appointments are made solely on merit.
- The commission is entirely responsible for assessing the merit of the candidates and selecting candidates for appointment.
- No candidate can be appointed unless recommended by the commission.
- The commission must consult the Lord Chief Justice and another judge of equivalent experience before recommending a candidate for appointment.

Required judicial qualities

- intellectual capacity
- personal qualities, including integrity, independence of mind, sound judgement, decisiveness, objectivity and willingness to learn
- ability to understand and deal fairly
- authority and communication skills
- efficiency

+ be of a good character and have a clean record

R v Judicial Appointments Commission (2014) -an applicant had seven penalty points on his drivers license for monitoring offences

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Justices of the Supreme Court

- appointed from those who hold high judicial office (judge in the Court of Appeal, those qualified to appear in senior courts for 15+ years
- part 3 Constitutional Reform Act (2005) - states that if there is a vacancy, the Office of the President of the Court must convene a Supreme Court Selection
  - ~ must include: the President & the Deputy President of the Supreme Court + one member of the Judicial Appointments Commission
  - ~ will decide on the selection process to be used, a candidate, and report this to the Lord Chancellor → accepts the nomination → notifies the Prime Minister → recommends the appointment to the Queen → she formally makes the appointment

Lords Justices of Appeal

- must be qualified as a barrister/solicitor and have 7+ years of experience in law to be a High Court Judge
- Selection process starts by the Lord Chancellor → requests the Judicial Appointments Commission to convene a selection panel
- After the interview, the panel selects candidates and Lords Justices of Appeal are officially appointed by the Queen

High Court Judges

- barrister/solicitor qualification & 7+ years of experience or have been a Circuit Judge for at least two years
- majority are appointed from barristers with 20-30 years of experience
- may also appoint Deputy High Court Judges (sit part-time)
- Although candidates do not have to be Deputy High Court Judges or Queen's Counsel, they are usually expected to have previous judicial experience at a lower level

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Circuit Judges

- qualified barrister / solicitor & 7+ years of experience or have been a Recorder
- 13% of Circuit Judges are former solicitors
- The Courts and Legal Services Act (1990) - allows for promotion after being a District Judge, magistrate or chairperson of an employment tribunal for 3+ years
- All applicants must do an online qualifying test to assess their abilities to perform judicial roles

Recorders

- Part-time post
- Barrister or solicitor qualification & 7+ years of experience
- 'Recorder-in-training' → Recorder

District Judges

- Same qualification & experience (5+ years) or have been a Deputy District Judge
- usually should have sat part-time as a Deputy District Judge before being considered for the position of District Judge

The role of the judiciary (General role)

- Judges decide disputes in a fair, unbiased way (applying the law of England & Wales)
- Judges in civil courts (County & High court) sit on their own without the jury
- A judge in a criminal court of first instance (trial court) sits in the Crown Court with a jury
- Responsible for case management before the trial

Role of Supreme Court judges

- Court hears ≈ 70 cases each year
- Includes appeals from the Court of Appeal (sometimes the High Court), courts in Scotland and Northern Ireland
- Can be either civil or criminal cases (usually more civil)
- Can only be appealed if involves a point of law

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- 12 judges in the Supreme Court (aka 'Justices')
- Must sit as an uneven panel (minimum 3) to hear a case
- any decision on a point of law will become a precedent for all lower courts to follow
- judges can also sit as the Judicial Committee of the Privy Council to hear appeal cases from overseas

Role of Court of Appeal judges

- Divided into Civil and Criminal Divisions (a panel of 3 normally hears cases)
- 38 Lords Justices of Appeal who decide on either cases
- Ciminal - appeals against sentence or conviction
- Civil - appeals against the finding of liability or the remedy awarded

Role of High Court Judges

- Each judge is assigned on of the Divisions: the Queen's Bench Division, the Chancery Division, or the Family Division
- Main function is to try a case of first instance (first time has been heard in court)
- A judge hears evidence from witnesses, reads case papers, decides the law and makes a decision as to which side has won (liability)

Inferior-level judges

- Circuit Judges - full time judges who hear both cases in the Country / Crown Court
- Civil cases in the Country Court - judge sits on their own
- Criminal cases in the Crown Court - judge sits with a jury who decides the verdict (guilty / not guilty), judge decides the law

~ Recorders - part-time judges who are appointed for a period of five years
- used mainly in the Crown Court to try minor criminal cases

~ District Judges (Magistrates' Court) - sit to try criminal cases (decide alone the verdict & sentence)

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Training

- Training of judges is carried out by the Judicial College

Three main elements to training:

1) Knowledge of substantive law, evidence and procedure
2) The acquisition and improvement of judicial skills
3) The social context within which judging occurs

1st appointment - all new judges go through an induction programme (5 days)
~ new judges are assigned to an experienced judge who acts as a mentor

Social context

- form of continuing education that involves training in human awareness (gender, racial and disability issues)
- aims to make judges more aware of other people's viewpoints

Retirement and removal

- the government cannot force a judge to resign / retire if they make a decision with which the government disagrees
- secure from political influence
- Judicial Pensions and Retirement Act 1993 - all judges have to retire at 70
- Lord Chancellor may authorise retired senior judges to sit part-time till 75

Superior - level judges

- have '**security of tenure**' - cannot be dismissed by the Lord Chancellor on behalf of the government (**Act of Settlement 1700**)
- judges can hold office while of good behaviour - is now also in the **Senior Court Act 1981** (for High Court Judges and Lords Justices of Appeal), **Constitutional Reform Act 2005** (for Justices of the Supreme Court)
- Lord Chief Justice can declare vacant of any judge who (though illness) is incapable of carrying out their work (**Administration of Justice Act 1973** → **Senior Courts Act 1981**)

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Inferior - level judges

- The Lord Chancellor may dismiss an inferior-level judge for incapacity or misbehaviour
- Constitutional Reform Act 2005 - must comply with set procedures and have consent from the Lord Chief Justice
- Dismissal for a criminal conviction - Bruce Campbell 1970, Constance Briscoe 2014
- Can also suspend a person from judicial office if convicted or subject to criminal proceedings

Complaints about judges

- Investigated by the Judicial Conduct Investigation Office
- If the complaints are true, the Lord Chancellor and Lord Chief Justice may take disciplinary action (formal advice, warning, reprimand, suspension, removal)
- District Judge Margaret Short (2009) - removed for 'inappropriate, petulant and rude' behavior

Judicial independence

- No person can be a judge in a case in which they have an interest
- Eg: Pinochet Case , Howell v Lees Millais (2007)

Key facts		
Title of judge	**Court in which they sit**	**Tenure**
Justices of the Supreme Court	Supreme Court	'During good behaviour' (s 33 of the Constitutional Reform Act 2005)
Lord Justices of Appeal	Court of Appeal: Civil Division or Criminal Division	'During good behaviour' (s 11(3) of the Senior Courts Act 1981)
High Court Judge	Civil cases: High Court Criminal cases (judges of QBD): Crown Court	'During good behaviour' (s 11(3) of the Senior Courts Act 1981)
Circuit Judges	Civil cases: County Court Criminal cases: Crown Court	Can be dismissed by the Lord Chancellor with agreement of the Lord Chief Justice
District Judges	Civil cases: County Court Criminal cases: Magistrates' Court	Can be dismissed by the Lord Chancellor with agreement of the Lord Chief Justice
Recorders	Civil cases: County Court Criminal cases: Crown Court	Appointed for a fixed term; appointment may not be renewed by the Lord Chancellor

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Pinochet Case

- Augusto Pinochet, former Chilean director, was arrested for human rights violations
- He argued for sovereign immunity, arguing he couldn't be prosecuted as a former head of state
- The House of Lords ruled that immunity does not apply to crimes like torture after the Torture Convention (1988)

Howell v Lees Millais (2007)

- The court ruled that a trustee's discretion should be exercised reasonably and in good faith
- Courts should not interfere unless trustees act irrationally or unfairly
- Case reinforced limited scope of judicial intervention in trust management

Bias and human rights

- Has been influenced by the European Convention on Human Rights
- Re Medicaments - the court followed decisions of the (ECHR)

The separation of powers

- Was first put forward by Montesquieu in the 18th century
- Theory states that there are three primary functions of the state
- Must keep these three functions seprate in order to safeguard the liberty of citizens

The three arms of the state identified by Montesquieu are as follows:

1 The legislature: the law-making arm of the state; in the UK, this is Parliament

2 The executive: the body administering the law; in the UK, this is the government

3 The judiciary: the judges who apply the law.

~ an overlap between the legislature and executive, as the ministers forming the government also sit in the Parliament and are involved in the law-making process

Independence of judges from the executive

- Judges are usually not involved in the law-making functions of parliament
- Full-time judges are not allowed to be members of the House of Commons
- Supreme Court created in 2009 was mainly to seprate the judiciary from legislature

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Independence of judges from the executive

- Superior - level judges cannot be dismissed by the government
- Can make decisions that may displease the government
- s3 Constitutional Reform Act 2005 - guarantees Judicial independence : states that the Lord Chancellor and other ministries of the government must uphold the continued independence of the judiciary

Freedom from pressure

- Several ways in which judges are protected from outside pressure
- Are given a certain degree of financial independence (salaries are given through the Consolidated Fund, so no need for Parliament's authorisation
- Have immunity from being sued for actions made in the course of their judicial duties (Sirros v Moore 1975)

Independence from political bias

- Writers point out to unintentional judicial bias
- Nearly 100 years ago, a judge in the Court of Appeal admitted it, pointing that:

- Judges aren't always consciously biased
- Their background, social circles, and training influence their thinking
- This can affect their ability to make fair and accurate judgments

Judicial review

- Were several challenges during the 1990s
- R v Home Secretary (1995) - changes to the Criminal Injuries Compensation Scheme made by Home Secretary were unlawful (ex parte Fire Brigades Union 1995)

Human rights

- Anti-Terrorism, Crime and Security Act 2001 - the courts have upheld challenges by asylum seekers and by detainees
- Human Rights Act 1998 (incorporating ECHR) - judges can declare in a case that an act is

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incompatible with the Convention (H v Mental Health Review Tribunal 2001)

- Put pressure on the government to change the law to comply with the Convention
- Increasing diversity of judges, improved training and decisions → may argue that they are no longer out of touch with the 'real world' and can challenge the establishment
- Challenged the Prime Minister's power without the Parliament's authority

CASE EXAMPLES

R (on the application of Q) v Secretary of State for the Home Department (2003)

Collins J in the High Court declared that the Home Secretary's power to refuse to provide assistance to asylum seekers who had not immediately, on their entry to the UK, declared their intention to claim asylum, was unlawful. The Court of Appeal upheld this decision, although it did suggest how the relevant Act could be made compatible with human rights.

A and Another v Secretary of State for the Home Department (2004)

The House of Lords declared that the Anti-Terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights.

The Act allowed foreign nationals to be detained indefinitely without trial, where there was suspicion that they were involved in terrorist activity. The Lords held that this breached both Article 5 (the right to liberty) and Article 14 (no discrimination on basis of nationality). This decision forced the government to change the law.

Decisions against the government

CASE EXAMPLE

DPP v Hutchinson (1990)

Women had camped by the Greenham Common Royal Air Force (RAF) base, in protest against the storage of nuclear missiles. Some of the women were prosecuted under a bylaw for being on Ministry of Defence property unlawfully. The House of Lords ruled in the women's favour, holding that the minister had exceeded his powers in framing the bylaw so as to prevent access to common land.

Pro-government decisions by judges

CASE EXAMPLES

Council of Civil Service Unions v Minister for the Civil Service (1984) (the 'GCHQ Case')

A minister for the Conservative government withdrew the right to trade union membership from civil servants working at the intelligence headquarters in Cheltenham. The House of Lords upheld the minister's right, and the decision was seen as anti-trade union.

Attorney-General v Guardian Newspapers Ltd (1987) (the 'Spycatcher' case)

The House of Lords granted an interlocutory injunction to the government banning the sale of a book about the security services, on the grounds that it was in the national interest of security to do so. This injunction was granted, even though the book had already been published in America and Australia.

Selection and appointment	• Traditional view was that judges are elderly white males • More female judges, and those from ethnic minorities, are being appointed, though judges at the highest level still have a majority of white males
Independence of judiciary – dismissal	• Superior level judges have security of tenure and can only be dismissed by parliamentary petition • Inferior level judges can be removed by Lord Chancellor with approval of Lord Chief Justice for misbehaviour or incapacity • Judicial salaries are paid from Consolidated Fund
Independence of judiciary – separation of powers	• Judges cannot hear a case in which they have an interest • Judiciary is separate from Legislature and Executive • Judges hear cases involving government decisions by judicial review • Judges will find against government when rules have not been correctly followed or applied

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Chapter 11

Legal professionals

~ In England and Wales, two main types of lawyer - barristers & solicitors

Barristers

- about 16500 barristers in practice (England and Wales)
- 3000 employed
- practicing barristers ('the bar') are controlled by their own professional body - the General Council of the Bar
- All practising barristers must be a member of one of the four Inns of the Court:
- Lincoln's Inn, Inner Temple, Middle Temple, Gray's Inn

Qualification and training

Entry to the Bar is normally degree-based, with at least a 2:1 degree:

- Graduates with a law degree can progress to Bar training.
- Graduates with a non-law degree will have to complete a one-year Graduate Diploma in Law (GDL) to achieve a certain amount of legal knowledge before progressing to Bar training.

From 2020, have to do the following to qualify

- Complete a Bar Course Aptitude Test (BCAT)
- Join one of the Inns of Court
- Complete the Bar Professional Training Course (1 year full-time, 2 years part-time)
- Complete 12 sessions of training provided by one of the Inns of Court
- Be called to the Bar by an Inn of Court
- Complete a 12-month pupillage (practical supervision training)

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Role of barristers

- Work from a set of chambers; can share administrative expenses with other barristers
- Booking in cases and negotiating fees
- Owes a duty of confidentiality to a client AND court - must not mislead or waste the court's time and provide all the relevant information (even if weakens their client's case)
- Court duty overrides the client's
- If a client confesses their guilt to the barrister, they cannot continue to represent them in a non-guilty defence
- Full rights of audience - can present a case in any court in England and Wales

Advocacy in criminal cases

- Baristas specialise in either prosecution or defence
- Prosecution - barrister is instructed by the Crown Prosecution Service (CPS)
- Advises on the likely success of the charges to ensure that there is sufficient evidence available to prove those charges
- Defendant - a barrister is instructed by a solicitor and will advise on the prosecution's strength and defence's weaknesses
- Follows the regular proceedings of a trial

Advocacy in civil cases

- Barrister is instructed by a solicitor or (except for family cases) directly by a client
- Most evidence is presented in writing before any court hearing
- After the hearing, the barrister will advise on the possibility of appeal against liability/ damages

Direct access

- In the past, people could only access barristers through solicitors - extra expense
- Bar Direct was later introduced - professionals (accountants, surveyors, etc) could brief a barrister directly
- Now is no longer necessary to go through a solicitor for most civil cases

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Limited advocacy work - some barristers specialise in areas such as tax or company law and rarely appear in court

Cab-rank rule

- Barristers cannot turn down a case if it's in the area of law they deal with and they are free to take the case
- May turn down in direct access where it requires services that they cannot provide

Employed barristers

- Can be employed by government organisations, the Civil Service, local government or businesses
- Ex: Crown Prosecution Service

Regulation (The General Council of the Bar)

- Represents barristers in England and Wales
- Promotes specialist advocacy and advisory services
- Fulfils the function of trade union, representing the interests of the Bar
- Promotes fair acuss to justice for all (ethics, equality, diversity)

Bar Standards Board

- Regulates the barrister's profession
- Sets training and entry standards + code of conduct
- The board investigates any alleged breach of the code - if matters get serious, refer to a disciplinary tribunal, which can impose the following:

- reprimanding the barrister (formally warning them about their behaviour)
- making the barrister complete further professional development training
- ordering the barrister to pay a fine
- suspending the barrister for up to three years
- in extreme cases, disbarring (striking off) the barrister.

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- A complaint can be made to the Legal Ombudsman if unhappy with the decision

Liability

- A barrister does not enter into a contract with a client, so they cannot be sued for breach of contract
- Can be liable for a poor quality of advocacy

Queen's Counsel

- Can become once completed 10+ years of practice as a barrister/solicitor with an advocacy qualification
- ≈ 10% of barristers practicing at the Bar are Queen's Counsels
- Take on more complicated and high-profile cases than junior barristers and can command higher fees for their recognised expertise
- Lawyers apply to become QCs

Solicitors

- about 147 000 practising in England and Wales
- Controlled by the Law Society (professional body)
- 75% work in private practice, remaining in employed work (eg: government)

Qualification and training

- Graduate Diploma in Law (GDL)
- Legal Practice Course (LPC) - training in skills such as client interviewing, negotiation, advocacy, drafting, legal research
- Two year practical training - training contract
- Professional Skills Course (builds on the LPC)
- Future qualification and training - new route for solicitor qualification (since September 2021) Trainees pass a two-stage Solicitor's Qualifying Examination (SQE) + qualifying work experience

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Role of solicitors

- Majority work in private firms
- Other careers include working in the Crown Prosecution Service, local authority, government department, or as legal advisers in businesses
- High-street firms will advise individual clients on topics such as:
  - *conveyancing (the legal side of buying and selling flats, houses, office buildings and land)*
  - *the making of wills*
  - *consumer problems*
  - *business matters*
  - *personal injury*
  - *family matters.*
- Involves interviewing clients, negotiating on their behalf, writing letters/emails, drafting contracts, leases, etc.
- Some act for clients in civil or criminal cases - litigation
- Civil cases - solicitors are the first source of legal advice
- Criminal cases - may initially meet in the police station

Specialising

- Usually specialise in one particular field (types of cases)
- Greater degree of specialisation in larger firms (departments deal with one area of law

Advocacy

- Rights of audience in the lower courts (Magistrates' and Country)
- From 2015, Level 1 allows advocacy in the Magistrates' Court + some limited Crown Court work
- Level 2 - assessed at an assessment centre, followed by assessment by judges in trials
- Solicitors with an advocacy qualification are eligible to be appointed as Queen's Counsel or judges

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Regulation

- When a solicitor deals directly with a client, they enter a contract, under which the solicitor has the right to sue if the client does not pay
- Client may also sue for breach of contract if the solicitor fails to do the agreed work
- Used to be that an advocate presenting a case in court could not be sued for negligence until Hall v Simons (2000)
- Can also be sued if other parties who are not their clients are affected by their negligent work
  White v Jones (1995)

CASE EXAMPLE

Hall v Simons (2000)

Three firms of solicitors were sued by their clients for negligent advocacy. The lower courts were bound by the decision of *Rondel v Worsley* (1969), which decided that lawyers could not be liable for negligent advocacy.

Using the Practice Statement 1966, the House of Lords ruled by reversing *Rondel v Worsley*. In light of changes in the law of negligence, the working of the legal professions, the administration of justice and public perceptions, the protection given to advocates was no longer appropriate.

CASE EXAMPLE

White v Jones (1995)

A father wanted to make a will leaving each of his daughters £9000. He wrote to his solicitors, instructing them to draw up a will to include this. The solicitors received this letter on 17 July 1986 but had done nothing about it by the time the father died on 14 September 1986. As a result, the daughters did not inherit any money. They successfully sued the solicitor for the £9000 they had each lost.

The Law Society

~ The governing body of solicitors that has supported their interest in England and Wales for almost 200 years
- All practising solicitors must be members of the Law Society

Solicitors' Regulatory Authority

~ Deals with complaints about professional misconduct of solicitors
- Will investigate the complaint and, if necessary, bring it to the Solicitors' Disciplinary Tribunal
- The tribunal will take action based on severity of the case

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Legal executives

- Over 20 000 practising legal executives in the UK
- Work in solicitors' firms, local authorities, the CPS and company legal departments
- Are qualified lawyers who passed the Institute of Legal Executives' Professional Qualification in Law

Qualification and training

- Necessary to pass the the Professional Diploma in Law and the Professional Higher Diploma in Law (PHDL)
- Should have also worked in a solicitors' firm or any other legal organisation for 5+ years
- Then becomes a Fellow of the Chartered Institute of Legal Executives
- Can then progress to become a solicitor by passing the Law Society's Legal Practice Course (LPC)

Role of legal executives

- handle parts of a property transfer
- assist in the formation of a company
- draft wills
- advise people with matrimonial problems
- advise clients accused of a crime
- advise a client detained in a police station
- interview witnesses.

- Have some rights of audience in court but can complete an advocacy course to obtain wider rights of audience

In litigation cases, there are three different practising certificates:

- a Civil Proceedings Certificate
- a Criminal Proceedings Certificate, which allows legal executives to make applications for bail or deal with cases in the Youth Court
- a Family Proceedings Certificate, which allows appearances in the Family Court of the Magistrates' Court.

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- Work for a firm of solicitors in private practice
- Charged at an hourly rate directly to clients

Regulation

- All legal executives are members of the Chartered Institute of Legal Executives (CILEx)

» provides education, training and development of skills for legal executives
» protects the status and interests of legal executives
» promotes and secures professional standards of conduct among members and those who are registered with the institute.

- Publishes a code of conduct and guides to practice
- Independent regulator of members of CILEx and investigates complaints about legal executives
- Following an investigation, a summary of the issues is prepared and the matter is put to the Professional Conduct Panel for consideration
- It has the power to:

» exclude a person from membership of the institute
» reprimand or warn the member
» order the legal executive to pay a fine and costs.

▼ Figure 11.2 Summary of the requirements for barristers, solicitors and legal executives

Key facts			
	Barrister	**Solicitor**	**Legal Executive**
Qualifications and training	• Degree-entry followed by Bar Course Aptitude Test (BCAT) • Join an Inn of Court • Bar Professional Training Course • Complete 12 training sessions • Call to the Bar • 12-month pupillage	• Degree-entry; Graduate Diploma in Law (GDL) for non-law-degree entrants • Legal Practice Course (LPC) • two-year training contract • Professional Skills Course • Admitted to Roll of Solicitors • Solicitors Qualifying Examination (SQE) from 2021	• Professional Diploma in Law and Professional Higher Diploma in Law • Work for at least five years
Role	• Self-employed, based in chambers • Briefed by solicitors but can carry out direct-access work in civil cases • Mostly advocacy work but can write opinions and draft documents	• Private practice in partnerships • Deal directly with clients • Can brief barrister if case is complex • Carry out wide variety of work but likely to specialise in one area	• Work for solicitors or other legal organisations • Carry out similar work to solicitors but in less complex matters
Regulation	• Bar Council • Bar Standards Board	• Law Society • Solicitors Regulatory Authority	• CILEx Regulation Board

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The Legal Ombudsman

- Set up by the Office for Legal Complaints
- Deals with complaints against all legal professionals

It can order a legal professional to:

» apologise to the client

» give back any documents the client might need

» put things right if more work can correct what went wrong

» refund or reduce any legal fees paid

» pay compensation of up to £30 000.

▼ **Figure 11.3** Evaluation of legal profession

The professions	• Separate professions of barristers, solicitors, and legal executives • Individual qualifications for entry and training • Barristers work with and for solicitors • Legal executives work with and for solicitors • Each profession has separate regulatory and disciplinary bodies
Composition of professions	• Traditionally, barristers and solicitors male dominated • More women than men now entering barristers' and solicitors' professions • More ethnic minority groups entering barrister's and solicitor's professions
Liability	• All professions liable in negligence to clients; indemnity insurance compulsory • Barristers and solicitor advocates liable for negligent advocacy • Solicitors and legal executives enter into contract with client – can sue for unpaid fees and be sued for not performing contract duties. • No contract between barrister and client – barrister cannot sue for unpaid fees

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Chapter 12

Lay personnel

Lay people - those who are not legally qualified

- Lay magistrates hear cases in the Magistrates' Court
- Jury tries cases in the Crown Court

Lay magistrates

- Usually sit as a bench of three
- Mainly deal with criminal cases

Role in civil cases

- Magistrates mostly deal with family matters in a Family Proceedings Court (privately)
- Hear cases in open court about non-payment of council tax or television licences

The Family Proceedings Court

- Hears family cases including protection against violence, affiliation cases, adoption orders and proceedings under the Children Act 1989
- Magistrates undergo extensive training before sitting in this court
- Private, informal setting where parties are seated around a large table
- Cases can be upsetting for both parties, so the court appoints very experienced lay magistrates
- Provide written reasons for their decisions & can be assisted with extra information

Role in criminal cases

- Lay magistrates sit as a panel of three, while a District Judge sits alone
- Magistrates try 97% of all criminal cases
- If the defendant pleads guilty, magistrates decide on a sentence after hearing representations from both sides
- Not guilty - hear evidence and decide guilt or innocence
- Sentencing powers are limited to a maximum of 6 months for one offence and a fine of £5000
- For indictable and in triable-either-way offences where the defendant opts for a Crown Court trial, they deal with preliminary hearings

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Youth Court

- Hears criminal charges against young offenders aged between 10 and 17
- Panels must usually include at least one man and one woman
- Hearings are informal and private

Appeals

- Lay magistrates may also sit in a Crown Court to hear appeals from a Magistrates' Court against a conviction or sentence
- Two lay magistrates form a panel with a qualified judge

Role of the magistrates' clerk

- Every magistrates' bench is assisted by a clerk (legal adviser)
- Guide lay magistrates on questions of law, practice and procedure
- Aren't allowed to assist in decision making

Qualifications

- Lay magistrates do not need to have any legal qualifications
- Must, however, be suitable in character, integrity and understanding for the work they have to perform

~ Key qualities set out by the Lord Chancellor in 1998 include:

- good character
- understanding and communication
- social awareness
- maturity and sound temperament
- sound judgement
- commitment and reliability

- Must also have certain 'judicial' qualities - able to assimilate factual information and make a reasoned decision upon it

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Other qualifications include

- Lay magistrates must be aged between 18 and 65 on appointment and have to retire at 70.
- Lay magistrates are expected to live or work within or near to the local justice area to which they are allocated.
- Lay magistrates must be prepared to commit themselves to sitting at least 26 half-days each year.

~ People with serious criminal convictions are not eligible to be appointed

· Additionally includes: undischarged bankrupts, police officers / traffic wardens, those with impaired hearing or other disabilities that make them unable to carry out their duties

Selection (local advisory committees)

· ≈ 1200 lay magistrates are appointed each year by the Senior Residing Judge
· Relies on recommendations made by local advisory committees
· Membership of these committees used to be secret, but became published since 1993
· The committee should have a maximum of 12 members
· May advertise through newspapers, noticeboards, adverts, etc to attract candidates
· When applying, candidates must fill an application form with names of two referees before being interviewed

There are two stages in the interview process:

Stage 1: looks at the candidates qualities and criminal record (if they have one)
Stage 2: tests candidates potential judicial aptitude by discussing example cases

Appointment - the advisory committees will interview candidates and submit their suggestions to the Senior Presiding Judge, who will appoint new magistrates from that list

Training

· Supervised by the Magisterial Committee of the Judicial College
· Mostly carried out in local areas due to the large number of lay magistrates
· The Judicial College provides some direct training for Bench Chairmanship and for members

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Of the local Training Committees + material delivery

New magistrates must:

- attend introductory training so that they understand the organisation of the bench, the administration of the court and the roles and responsibilities of those involved in Magistrates' Courts
- attend training on the key skills, knowledge and understanding required of magistrates
- attend court and observe experienced magistrates in action
- visit establishments, such as a prison or a probation office.

Mentors

- Each new magistrate keeps a personal development log of their progress and has a mentor
- Some court sessions will be monitored during the first two years

Appraisal

- Whenever the magistrate is ready (usually after one year), there will be an appraisal to check if they have acquired the necessary skills
- If unable to satisfy the appraiser, the magistrate will be given extra training
- If unable to showcase their skills after extra training, the matter will be referred to the local advisory committee, who may suggest to remove the magistrate from the setting
- Involves 'on the job' training
- Magistrates who chair the bench are given extra training and are appraised for this role

Juries (role in criminal courts)

- Have been used in the English legal system for over 1000 years
- Most important use of juries is in the Crown Court
- Jury trials account for less than 1% of all criminal trials - 97% of cases are dealt with in the Magistrates' Court and 2/3 defendants will plead guilty at Crown Court

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Evaluation of lay magistrates

Key facts	
Qualifications	• Aged 18 to 65 on appointment; can sit until 70 • Need to live or work in or near the local justice area • Six key qualities required, e.g. understanding and communication skills, social awareness, sound judgement • Disqualified by criminal record, bankruptcy or work that is incompatible
Appointment	• Recommended by local advisory committees • Senior Presiding Judge formally appoints
Training	• Supervised by the Magisterial Committee of the Judicial College • Initial training with mentor appointed • Regular subsequent training and specialist training, e.g. chairing a bench or family work • Regular appraisals
Composition of bench	• Three lay magistrates • 12000 lay magistrates nationally: • 56% women • 12% BAME • 84% aged over 50; 1% aged under 30
Role	• Hear trials of summary offences, sentence guilty pleas • Deal with ancillary matters, e.g. issuing warrants, hearing bail applications, committals • Sit in Youth Court if specially trained • Can sit with a judge to hear appeals in Crown Court • Sit in Family Proceedings Court if specially trained

	Advantages of use of lay magistrates	Criticisms of use of lay magistrates
Background	• Cross-section of local people appointed; more representative than professional judges • Good gender balance nationally • Reasonable percentage from BAME groups nationally	Not a true cross-section of the population – 84% are aged over 50 and the majority are from professional or managerial backgrounds
Locality	Have to live or work locally – should have some knowledge of the area and its problems; awareness of local issues and opinions and patterns of crime	Unlikely to live in problem areas and so do not truly know the area's issues; local knowledge being lost due to court closures
Cost	Cheaper than using professional judges, as only receive expenses Cheaper than Crown Court for dealing with cases	More District Judges having to be appointed, as fewer lay magistrates are volunteering
Training	• National training tailored for lay magistrates • Local training for specific issues • Mentor scheme provides support for newly qualified magistrates • Annual appraisals identify possible issues in service	Despite training, there can be inconsistencies between benches on sentencing
Law	Use of legal adviser makes decisions legally based	Too great a reliance on legal adviser
Appeals	Few appeals made against conviction or sentence	Possible bias in favour of police and prosecution

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Split function

- A judge decides points of law and the jury decides the facts
- The judge has the power to direct the jury to acquit the defendant if the prosecution's evidence has not made out a case against the defendant - directed acquittal
- The defence will then put its case and call any witnesses before the jury privately makes a decision on the guilt or innocence
- The jury must first try to come to a unanimous verdict - on which all the members agree
- The judge must accept their verdict whether or not they agree with it (Bushell's Case 1670)

Majority verdicts

- If the jury hasn't reached the verdict after two hours, the judge can call it back into the courtroom and direct that a majority verdict can be accepted
- Full jury of 12, the majority can be 10-2 or 11-1
- Below 12, one can disagree with the verdict - 10:1 , 9:1
- Nine jurors, the verdict must be unanimous, as the jury cannot go below nine members
- Introduced because of the fear of jury 'nobbling' - being bribed or intimidated by associates
- s17(3) the Juries Act (1974) - aims to make sure that the jury has come to a legal majority

Qualifications for jury service

- The Juries Act (1974) sets out the following qualifications:

» aged between 18 and 75 inclusive

» registered as a parliamentary or local government elector

» ordinarily resident in the UK, the Channel Islands or the Isle of Man for at least five years since their thirteenth birthday.

In addition, the person must not be:

» a mentally disordered person, or

» disqualified from jury service.

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Disqualification criteria (permanent)

» imprisonment for life, detention for life or custody for life

» detention during Her Majesty's Pleasure or during the Pleasure of the Secretary of State

» imprisonment for public protection or detention for public protection

» an extended sentence

» a term of imprisonment of five years or more

» a term of detention of five years or more

Those in the following categories are disqualified for ten years:

» those who have at any time in the last ten years served a sentence of imprisonment

» those who have at any time in the last ten years had a suspended sentence passed on them

» those who have at any time in the last ten years had a community order or other community sentence passed on them

+ anyone on bail in criminal proceedings

Eligibility issues

- **Lack of capacity** - no understanding of English, disability
- **Discretionary excusals** - anyone with problems that make it difficult for them to do jury service (too ill, disability, nursing mother)
  ~ During temporary events, the court is most likely to defer jury service to a more convenient date (business appointments, examinations, holiday vacations)
- **Members of the armed forces** - if their commanding officer certifies that their absence from duty would be prejudicial to the efficiency of the service
- **Lawyers and police on juries** - are eligible to serve on juries, despite it potentially leading to bias (Hanif v United Kingdom 2012, was ruled that having a police officer on the jury was a breach of Article 6(1) of the European Convention on Human Rights - the right to a fair trial. However, the judge ruled that it did not matter any the case continued with him)

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- **Judges on jury service** - In June 2004, a judge from the Court of Appeal was summoned to attend as a juror

This prompted the Lord Chief Justice, Lord Woolf, to issue observations to judges who are called for jury service. These point out the following:

» A judge serves on a jury as part of their duty as a private citizen.

» Excusal from jury service will only be granted in extreme circumstances.

» Deferral of jury service to a later date should be sought where a judge has judicial commitments that make it particularly inconvenient for them to do jury service at the time they were called to do so.

» At court, if a judge knows the presiding judge or other person in the case, they should raise this with the jury bailiff or a member of the court staff if they consider it could interfere with their responsibilities as a juror.

» It is a matter of discretion for an individual judge sitting as a juror as to whether they disclose the fact of their judicial office to the other members of the jury.

» Judges must follow the directions given to the jury by the trial judge on the law and should avoid the temptation to correct guidance that they believe to be inaccurate, as this is outside their role as a juror.

Selecting a jury

- At each Crown Court, an official is responsible for summoning jurors to try the cases
- Arranges names to be selected at random from the electronic registers for the area the court covers through computer selection at a central office
- Must summon more than 12 jurors in case some are disqualified/excused
- Expected to attend for two (or more) weeks of jury service (depending on the length of a trial

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Vetting

- Both prosecution and defence have the right to see the list of potential jurors
- In some cases, it is decided that those jurors should be checked for suitability ('vetted')

DBS checks - can be made on prospective jurors to eliminate those who are disqualified

Authorised jury checks

- Brought by the 'ABC' trial in 1978
- The Attorney-General published guidelines in 1980 on when political vetting of jurors should take place. It states that:

» Vetting should only be used in exceptional cases involving national security, where part of the evidence is likely to be given on camera (in secret), such as in terrorism cases.

» Vetting can only be carried out with the Attorney-General's express permission.

Challenging

- Jurors are divided into groups of 15, out of which 12 are randomly selected by the court clerk
- Once selected, they come into the jury box to be sworn in
- Both prosecution and defence have the right to challenge the jurors through: to the array, for cause

To the array

- Challenge to the whole jury
- On the basis that it has been chosen in an unrepresentative or biased way
- Was used successfully against the 'Romford' jury at the Old Bailey in 1993 when, nine juries out of 12 came from Romford, with two of them living within 20 doors of each other
- Also used in R v Fraser (1987), as the defendant was from a BAME background but all jurors were white
- However, in R v Ford (1989), it was held that if the jury was chosen randomly, then it could not be challenged simply because it was not multi-racial

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For cause

- Involves challenging the right of an individual juror to sit on the jury
- Must point out a valid reason (disqualified, related to a witness/defendant)
- Risk of conviction being quashed if not removed

Prosecution right to stand by jurors

- Only prosecution can exercise this right
- Allows a juror to be put to the end of the list of potential jurors, so that they will not be used on the jury unless there are not enough other jurors.
- Prosecution does not have to give a reason for 'standing by', but should also not abuse their powers

Key facts

Aspects	Summary
Qualification	• Aged 18–75 inclusive • Registered to vote • Resident in the UK for at least five years since age 13
Disqualification	• Sentenced to five years' or more imprisonment = disqualified for life • Served a prison sentence OR suspended sentence OR a community order = disqualified for ten years • On bail = disqualified while on bail
Excusals	• Members of the armed forces • Discretionary: ill, business commitments or other 'good reason'
Selection	• A central office selects names from the lists of electors • Summons sent to these people • Must attend unless disqualified or excused
Vetting	• May be checked for criminal record (*R v Mason* (1980)) • In cases of national security, may be subject to a wider check on background (subject to Attorney-General's guidelines)
Challenges	• Individual juror may be challenged for cause, e.g. knows defendant • Whole panel may be challenged for biased selection – but no right to a multi-racial jury (*R v Ford* (1989)) • Prosecution may 'stand by' any juror
Function	• Decide verdict: guilty or not guilty • Sole arbiters of fact but judge directs them on law • Verdict: – must try for a unanimous verdict – if cannot reach a unanimous verdict, then a majority verdict can be accepted of 10–2 or 11–1

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Disadvantages of the jury system

- Bias - jurors may have prejudice than can affect the deliberations
- Media influence - may be influenced by public opinion and media coverage

CASE EXAMPLES

R v West (1996)

Rosemary West was convicted for the murders of ten young girls and women, including her own daughter. From the time the bodies were first discovered, the media coverage was intense. In addition, some newspapers had paid large sums of money to some of the witnesses in order to secure their story after the trial was completed.

One of the grounds on which Rosemary West appealed against her conviction was that the media coverage had made it impossible for her to receive a fair trial. The Court of Appeal rejected the appeal, pointing out that otherwise it would mean that if 'allegations of murder were sufficiently horrendous so as to inevitably shock the nation, the accused could not be tried'. It also said that the trial judge had given adequate warning to the jurors to consider only the evidence they heard in court.

R v Taylor and Taylor (1993)

Two sisters were charged with murder. Some newspapers published a picture that gave a false impression of what was happening. After the jury convicted the two defendants, an appeal was made on the grounds of the possible influence this picture could have had on the jury's verdict; the Court of Appeal quashed the convictions.

Use of the internet

- Have been cases where the jury members had done internet research regarding the case (R v Karakaya 2005)
- Internet information may be prejudicial to the defendant
- Criminal Justice and Courts Act 2015 - makes it a criminal offence with a maximum penalty of two years' imprisonment intentionally to research the internet for information regarding the case + disclose such information to other members of the jury.

Alternatives the use of a jury

~Trial by a single judge

- Used in the majority of civil cases in England and Wales
- Generally regarded as producing a fairer and predictable result
- However, judges become case-hardened and prosecution-minded
- Are from elite groups and have little understanding of the backgrounds and problems of most defendants

~Trial by a panel of judges

- 3-5 judges sit together
- Allows for a balance of views

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- Same issues with judges becoming case-hardened and prosecution-minded
- Not sufficient judges
- Expensive

~ A judge sitting with lay assessors

- The judge and two lay people make the decision together
- Used in Scandinavian countries
- The lay people could be either drawn from the general public (same as juries) or a special panel of assessors uld be drawn up, as in tibunal cases
- Suitable for fraud cases

~ A mini-jury

- A jury of around nine members and a professional judge
- A jury of six for less criminal cases

	Advantages of use of jury	Criticisms of use of jury
Public confidence	• Long-established system • Jury considered a fundamental requirement of a democratic society • Lord Devlin: 'the lamp that shows that freedom lives' • Michael Mansfield: 'the jury is the most democratic element of our judicial system'	• Public confidence can be lost by perverse decisions • No intelligence tests used – long, complicated trials may not be understood by some jurors • Service is compulsory so may be unpopular • Jury tampering may occur in a limited number of cases
Jury equity	• Decisions based on fairness; no reasons given • *R v Ponting* (1985) – jury refused to convict when his defence was that he acted in public interest • *R v Kronlid* (1996) – jury refused to convict when defence was lawful excuse • *R v Randle and Pottle* (1991) – jury refused to convict for helping spy escape from prison due to time lapse	• Decisions such as *Ponting*, *Kronlid* and *Randle and Pottle* can be considered perverse (wrong) • Juries may acquit too many defendants
Open justice	• Trial in public • Explaining issues to jury will help defendant understand law and process	• Events outside jury room can be investigated which could have affected decision making • *R v Young* (1995) – some members used a Ouija board • *R v Karakaya* (2005) – juror shared internet search results about case with other jury members
Secret discussion	• Jury free of pressure in making decisions	• Lack of reasoning could suggest jury did not understand the case, especially in fraud trials
Impartiality	• Members of jury not connected to the case • Not case-hardened	• Secret discussions may result in jury members influencing others, just to reach a verdict • Jury may be influenced by reporting of case – *R v Taylor and Taylor* (1993)
Representative	• Due to random selection, a wide range of ages and backgrounds – the jury will be representative	• Selection based on electoral register may mean it is unrepresentative

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