3. A hybrid Commission
Nowadays the judiciary can publicise and advertise when there are job vacancies available which was never available previously.

Termination of appointment

1. **Dismissal**
   The machinery for dismissal has been used successfully only once, when in 1830 Sir Jonah Barrington, a judge of the High Court of Admiralty in Ireland was charged with appropriating £922 to his own use.
   Under the Courts Act 1971, circuit judges and district judges can be dismissed by the Lord Chancellor, if the Lord Chief Justice agrees.
   In dismissing a judge, s.108 (1) of the Constitutional Reform Act 2005 provides that the Lord Chancellor will have to comply with any procedures that have been laid down to regulate this process. In addition to dismissal there is also the power not to reappoint someone who had been appointed for a limited period only.

2. **Discipline**
   In practice the mechanisms for disciplining judges who misbehave are more significant than those for dismissal. The pressure group JUSTICE had recommended the establishment of a formal disciplinary procedure in its report on the judiciary in 1972. The Office for Judicial Complaints was set up in 2006 to handle complaints about judges and provide advice and assistance to the Lord Chancellor and the Lord Chief Justice.
   A person can be suspended from judicial office for any period when they are subject to criminal proceedings, have been convicted, are serving a criminal sentence, are subject to disciplinary procedures or where it has been determined it is necessary for maintenance of public confidence in the judiciary.
   As well as the formal procedures discussed above, judges may be criticised in Parliament, or rebuked in appellate courts, and are often censured in the press.

3. **Resignation**
   Serious misbehaviour has on occasion been dealt with not by dismissal, but by the Lord Chancellor suggesting to the judge that he or she should resign.

4. **Retirement**
   Judges usually retire at 70, although they are sometimes to work part time up to the age of 75.

5. **Removal due to infirmity**
   The Lord Chancellor has powers to remove a judge who is disabled by permanent infirmity from the performance of his or her duties and who is incapacitated from resigning his or her post.

When should Judge’s make law?

1. **Adapting to social change.**
   In 1952, Lord Denning gave a lecture called ‘The Need for a New Equity’, arguing that judges had become too timid about adapting the law to the changing conditions of society. He felt they were leaving the role too much for Parliament, which was too slow and cumbersome to
do the job well.

2. **Types of Law**
   Lord Reid has suggested that the basic areas of common law are appropriate for judge-made law, but that the judges should respect the need for certainty in property and contract law, and that criminal law, except for the issue of mens rea, was best left to Parliament.

3. **Consensus law-making**
   Lord Devlin has distinguished between activist law-making and dynamic law-making. With regards to some laws, at first society will be divided about them, and there will be controversy, but eventually such ideas may come to be accepted by most members of society, or at least members will become prepared to put up with them. At this stage we can say there is consensus.
   Law-making which takes one side or another while a topic is still controversial is what Devlin called dynamic law-making, and he believed judges should not take part in it because it endangered their reputation for independence and impartiality.

4. **Respecting Parliamentary Opinion**
   It is often stated that judges should not make law where there is reason to believe Parliament does not support such changes. *President of India v La Pintada Compania Navigacion SA* [1984]. Similarly, it is sometimes argued that judges should avoid making law in areas of public interest which Parliament is considering at the time. Lord Radcliffe suggested that, in such areas, judges should be cautious “not because the principles adopted by Parliament are more satisfactory or more enlightened, but because it is unacceptable constitutionally that there should be two independent sources of law-making at work at the same time.

5. **Protecting individual rights**
   Anthony Lester QC praises development in this department, arguing that the judges can establish protection for the individual against misuse of power, where Parliament refuses to do so.

**Advantages of Case Law**

1. **Certainty**
   Judicial precedent means that litigants can assume that like cases will be treated alike.

2. **Detailed practical rules**
   Case law is a response to real situations, as opposed to statutes, which may be more heavily based on theory than logic. Case law shows the detailed application of the law to various circumstances, and thus gives more information than statute.

3. **Free market in legal ideas**
   Hayek (right-wing philosopher) has argued that there should be as little legislation as possible, with case law becoming the main source of law. He sees case law as developing in line with market forces; if the ratio of a case is seen not to work, it will be abandoned; if it works, it will be followed. In this way the law can develop in response to demand.
In *R v Fraill and Stewart [2011]*, a juror chatted with a defendant on Facebook after he had been acquitted but while the jury was still considering the verdict of a co-defendant. In these communications the juror discussed the jury’s ongoing deliberations in the jury room. The juror was a vulnerable woman of low intelligence, but she knew what she was doing was wrong and was sentenced to eight months’ custody for contempt of court.

**When are jurors used?**

**Criminal Cases:**

Actually only operate in a minority of criminal cases and their role is constantly being reduced to save money. Juries only decide cases heard in the Crown Court. However, successive governments have attempted to reduce the use of juries in criminal cases in order to save money. *The Criminal Law Act 1977* removed the right to jury trial in a significant number of offences, by making most driving offences and relatively minor criminal damage cases summary only. Since 1977, more and more offences have been removed from the realm of jury trial by being made summary only. The sentencing powers of magistrates have been increased by the *Criminal Justice Act 2003*. Prior to that Act, magistrates could only sentence a person to six months’ imprisonment for a single offence. Following the passing of the 2003 Act, magistrates can sentence offenders to up to 12 months’ imprisonment for a single offence, and this could be increased further to 18 months by delegated legislation. By increasing the magistrate’s sentencing powers, the aim was for more cases to be tried in the magistrate’s court rather than being referred up to the Crown Court to be tried by an expensive jury.

The *Criminal Justice Act 2003* provides for trial by judge alone in the Crown Court in two situations; i) where a serious risk of jury tampering exists (s.44); or ii) where the case involves complex or lengthy financial and commercial arrangements (s.43). In this second scenario, trial by judge alone would be possible where the trial would be so burdensome upon a jury that it is necessary in the interests of justice for the case to be heard without the jury.

**Civil Cases:**

In the past, most civil cases were tried by juries, but trial by jury in the civil system is now almost obsolete. Today the *Senior Courts Act 1981* gives a qualified right to jury trial of civil cases in four types of cases:

1. Libel and slander
2. Malicious prosecution
3. False imprisonment, and
4. Fraud.

In these cases, the jury trial is to be granted, unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made with a jury. The right is exercised most frequently in defamation actions, although its use may be more limited now that the *Defamation Act 1996* has introduced a new summary procedure for claims of less than £10,000 which can be heard by a judge alone. In all other cases, the right to jury is a discretion of the court.

**Qualification for jury service**

Before 1972, only those who owned a home which was over a prescribed rateable value were eligible for jury service. The Morris Committee in 1965 estimated that 78 percent of the names on the
the person. There was a crucial dispute on the evidence between the appellant and the officer about the way in which he was searched and what had been said. After the trial, his solicitor discovered by chance that a policeman had sat on the jury. This policeman had not known the victim, but had previously served in the same police station at the same time. The House of Lords noted that unlike the first appellant, there was a link between the case and the police officer serving on the jury and an important issue turned on a conflict between police and defence evidence.

The third appellant had been convicted of rape. The jury included a solicitor employed by the Crown Prosecution Service. Before the trial began he wrote informing the court of this fact. The defence counsel challenged the juror on the ground of potential bias, but the judge rejected this challenge and the third appellant was selected to be the foreman of the jury. This conviction was quashed.

Thus, unfortunately, following this case, there is no hard and fast rule regarding whether CPS lawyers and police officers can sit on juries. Instead, the issue will be decided on a case-by-case basis.

People summoned for jury service must write to inform the court if they are employed in the criminal justice system so that the trial judge can consider whether there would be apparent bias before the trial begins. Unfortunately, in practice, it will not always be possible for a trial judge to evaluate the significance of evidence before it is called.

**Summoning the jury**

- Every year almost half a million people are summoned to do jury service.
- Computers are used to produce a random list of potential jurors from the electoral register.
- Summons are sent out (with a form to return confirming that the person does not fall into any of the disqualified or ineligible groups), and from the resulting list the jury panel is produced.
- Jurors also receive a set of notes which explain a little of the procedure in the jury service and functions of the juror.
- Jury service is compulsory and failure to attend a hearing or not returning a form to confirm that the person does not fall into any of the disqualified or ineligible groups or not fit for service through drink or drugs, is contempt of court and can result in a fine.
- The jury for a particular case is chosen by random ballot in open court – the clerk has each panel member’s name on a card, the cards are shuffled and the first 12 names called out.
- In a criminal case there are usually 12 jurors and there must never be fewer than 9. In civil cases in the county court there are 8 jurors.

**Jury Vetting**

In certain cases care must be taken not to include on a jury anyone holding extremist views. With the permission of the Attorney General the court will vet the list of potential jurors by checking police files and Special branch records. Anyone found unsuitable as a result of this vetting will then not be allowed to serve on the jury. Jury vetting therefore consists of checking that the potential juror does not hold ‘extremist’ views which some feel would make them unsuitable for hearing a case.

This controversial practice first came into light in 1978, in the case R v Aubrey Berry and Campbell [1978], in which two journalists and a soldier were accused of collecting secret information, in breach of the Official Secrets Act. During the trial it became known that the jury had been vetted to check their ‘loyalty’, under guidelines ordered by the Attorney General and a new trial was ordered.

The legality of vetting was considered by the Court of Appeal in two cases during 1980:

**R v Sheffield Crown Court, ex parte Brownlow**

The defendants were police officers, and the defence wanted the jury vetted for previous convictions. The prosecution opposed it, but the Crown Court judge ordered that vetting should take place, and this decision was upheld by the Court of Appeal. Lords Denning and Shaw, obiter dicta, vigorously...
contracts because they have not wanted to increase the amount of comparatively poorly paid state-funded work they have to take on.

- **Problems with conditional fee arrangements**  
The Access to Justice Act 1999 removed personal injury cases from the state funding system, so that these can only be funded privately or by a conditional fee arrangement. Much of the criticism of the current funding arrangements is concerned with the use of these conditional fee arrangements.

- **Cost-cutting**  
Critics, including, the legal professions and some MPs, have accused the Government of putting cost-cutting before access to justice. There are particular concerns that civil cases will suffer from the priority given to criminal defence work. In order to meet its obligations to guarantee a fair trial under human rights legislation, the Government has had to continue to allow the funding for criminal defence be demand-led.

- **Public defenders**  
The legal profession has fiercely opposed the idea of the Commission employing its own lawyers to do criminal defence work. Both the Bar Council and the Criminal Law Solicitors Association have expressed concern that lawyers who are wholly dependent on the State for their income cannot be sufficiently independent to defend properly people suspected of crime.

At the moment, surprisingly, the public defender service is providing more expensive than private solicitors. The average cost of a case handled by the public defender service is over £800, compared with £506 for private practice.

- **Small businesses**  
Research has found that the withdrawal of state funding for business disputes is leaving low-paid workers, such as self-employed cleaners and taxi-drivers, with no means of redress if their businesses run into legal difficulties.

- **Lack of independence from Government**  
State-funded work is likely to become the most important source of income for those firms which hold contracts – in some cases, even the only source of income. There are therefore concerns that the threat of losing their contract if they make themselves unpopular with the Government might lead firms to shy away from taking on cases that challenge Government action, or might in any other way embarrass or annoy the Government.

- **Poorer standards of work**  
A survey carried out in 1999 for the Legal Aid Practitioners Group found that 84 per cent of legal aid firms believed that Act’s reliance on exclusive contracts would reduce the quality of legal services.

- **Over-billing**  
Lawyers may be charging the Government too much for their work.
• The cost of criminal cases
  Criminal legal aid is becoming increasingly expensive.

• Reliance on private practice
  When the legal aid system was first set up, the Government had a choice between using the existing private practice structures or setting up a totally separate system of lawyers, who would be paid salaries from public funds, rather than being paid on a case-by-case basis.

Conditional Fee Agreements
In 1990 the Courts and Legal Services Act (CLSA) made provision for the introduction of conditional fee arrangements, sometimes known as 'no win, no fee' agreements. Under a conditional fee agreement, solicitors can contract to take no fee or reduced fee from their client if they lose, and they raise their fee by an agreed percentage if they win, up to a maximum of double the usual fee.

Advantages of conditional fee agreements
• Cost to the state
  Conditional fee arrangements cost the state nothing – the costs are entirely borne by the solicitor or the losing party. By removing the huge number of personal injury cases from state funding and promoting conditional fee arrangements for them instead, the Government claims it can devote more resources to those cases which still need state-funding, such as tenant’s claims against landlords, and direct more money towards suppliers of free legal advice, such as Citizen’s Advice Bureau.

• Wider access to justice
  The Ministry of Justice believes that conditional fee arrangements allow many people to bring or defend cases who would not have been eligible for state funding and who could not previously have afforded to bring cases at their own expense.

• Performance incentives
  Supporters claim conditional fees encourage solicitors to perform better, since they have a financial interest in winning cases funded this way.

• Wider Coverage
  Conditional fee agreements are allowed for defamation actions, and cases brought before tribunals, two major gaps in the provision of state funding.

• Public Acceptance
  The Law Society suggests that clients have readily accepted conditional fee arrangements in those areas where they have been permitted in the past. Within two years of the agreements being introduced, almost 30,000 conditional fee agreements had been signed, and by 1999 and 25,000 were in operation.

• Fairness to opponents
  There are restrictions on the costs state-funded clients can be made to pay to the other side, which can give them an unfair advantage, particularly in cases where both sides are
general power to detain individuals for questioning, whether as suspects or potential witnesses. In practice, the police often acted as if they had these powers.

The 1981 Royal Commission on Criminal Procedure recommended that the police should be given express powers to detain suspects for questioning, with safe-guards to ensure that those powers were not abused.

In terrorist cases, under the Terrorism Act 2006, a person can be detained for up to 14 days, reduced from 28 days by the coalition Government. The custody officer is responsible for keeping the custody record (which records the various stages of detention) and checks that the provisions of PACE in relation to the detention are complied with. These theoretical safeguards for the suspect have proved weak in practice.

Once a person has been charged, they cannot normally be subject to further questioning by the police. Post-charge questioning is only currently allowed if an interview is necessary to prevent or minimise harm or loss, to clear an ambiguity in a previous statement, or where it is in the interests of justice for a person to be given the opportunity to comment on information that has come to light following charge. The current ban on post-charge questioning aims to reduce the risk of false confessions, which become increasingly likely the longer a person is detained or questioned.

Detaining a suspect so the police can question them, in the hope of securing a confession. This has become a very important tool in investigating, as it is cheap (compared to scientific evidence) and the end result, a confession, is seen as reliable and convincing evidence by judges and juries alike.

Unfortunately, as the miscarriages of justice show, relying too much on confession evidence can have severe drawbacks. Furthermore, the pressure of constant questioning, and the fact that the police seem convinced of their case, may temporarily persuade the suspect that they must have done the act in question. The young and mentally-ill are likely to be particularly vulnerable.

Safeguards for the suspect
Certain safeguards are contained in PACE to try to protect the suspect in the police station.

1. The caution
   Under Code C, a person must normally be cautioned on arrest, and a person whom there are grounds to suspect of an offence must be cautioned before being asked any questions. “You do not have to say anything, but it may harm your defence if you do not mention when questioned anything which you later rely on in court. Anything that you may say may be given in evidence.”

2. Tape-recording
   Section 60 of PACE states that interviews must be tape-recorded. Designed to ensure that oppressive treatment and threats could not be used, nor confessions made up by the police. However, proved a weaker safeguard than it might seem.

3. The right to inform someone of the detention
   Section 56 of PACE provides that, on arrival at a police station, a suspect is entitled to have someone, such as a relative, informed of their arrest. The person who the suspect chooses must be told of the arrest, and where the suspect is being held, without delay.

4. The right to consult a legal adviser
   Under section 58 of PACE, a person held in custody is entitled to consult a legal adviser,
2. The Criminal Appeal Act 1995 established the Criminal Cases Review Commission, following a proposal made by the RCCJ. This body is not a court deciding appeals, rather it is responsible for bringing cases, where they may have been a miscarriage of justice.

3. Following the Access to Justice Act 1999, appeals by way of case stated have been introduced from the Crown Court to the High Court. Before, these were only available from the magistrate’s court. There are only about 20 such cases a year.

Second appeal to the Court of Appeal
In exceptional circumstances, the Court of Appeal will be prepared to hear an appeal twice, in other words an appeal from its own earlier decision in the same case. This was decided in the landmark cases of;

Taylor v Lawrence [2002]
The Court of Appeal had dismissed the first appeal, which had been based on the fact that the judge at first instance had been a client of the claimants. After the first appeal, the appellant then discovered the judge had not been asked to pay for work carried out the night before the case went to court. When this came to light, the Court of Appeal ruled that it would hear a second appeal. The Court of Appeal laid down guidelines for future cases on when it would be prepared to hear a second appeal in the same case.

Procedure before the Court of Appeal
Admissions of fresh evidence
It does not listen to the whole case again, instead it merely aims to review the lower court’s decision. This is mainly because the Court of Appeal is reluctant to overturn the verdict of a jury, apparently fearing that in doing so it might undermine the public’s respect for juries in general.

The Court of Appeal can admit fresh evidence if they think it is ‘necessary or expedient in the interests of justice’ – Criminal Appeal Act 1968, s.23(1). In deciding whether to admit fresh evidence they must consider whether:

- The evidence is capable of belief
- The evidence could afford a ground for allowing the appeal
- The evidence would have been admissible at the trial
- There is a reasonable explanation why it was not so adduced.

Outcome of the appeal
The appellate court can allow the appeal, dismiss it or order a new trial. Under section 2 of the Criminal Appeal Act 1968 (as amended by the 1995 Act) an appeal should be allowed if the court thinks that the conviction is unsafe. The Court of Appeal may order a retrial where it feels this is required in the interests of justice. It will only do so if it accepts that the additional evidence is true but is not convinced that it is conclusive – in other words, that it would have led to a different verdict.

The Supreme Court
The Supreme court is the highest national appeal court for both civil and criminal matters. It was established in 2009 following the abolition of the House of Lords by the Constitutional Reform Act 2005.

For abolition of the Supreme Court
- The Court of Appeal should be sufficient; a third tier is unnecessary and illogical.
- It allows a litigant with the support of a minority of judges to win. E.g. a litigant losing a civil case, appealing to the Court of Appeal and losing, but finally winning in the Supreme Court.
Counting all the judges involved together, they may have had six against them, yet if the three judges in the Supreme Court are in their favour, they win the case overall, even though twice as many judges supported their opponent.

- It adds cost and delay to achieving a decision.
- The Supreme Court offers nothing beyond finality, and that could be more efficiently achieved without it.

**Against abolition of the Supreme Court**

- Its small membership allows the Supreme Court to give a consistent leadership that the Court of Appeal, with its much greater number of judges, could not, and therefore to guide the harmonious development of the law.
- The combination of the two appellate courts allows the majority of appeals to be dealt with more quickly than the Supreme Court could hope to deal with them, while still retaining the smaller court or those matters which require further consideration, and for promoting consistent development of the law.
- The Supreme Court plays a valuable role in correcting decisions by the Court of Appeal. In 2007 the then House of Lords heard 58 decisions, of which 40 percent were successful.
- The former House of Lords made some important contributions to the development of our law, including making marital rape a crime, and confirming the restricted scope of parental rights in a modern society.

**Lord Woolf on appeals**

With regards to civil appeals, Lord Woolf has recommended the introduction of a system where cases could be referred to the Court of Appeal or House of Lords (now the Supreme Court) in order to ensure the proper development of the law. This would be appropriate where the lower court has reached an unsatisfactory decision but where no appeal has been brought, or is possible.

**Criminal Cases Review Commission**

The CCRC was established to replace the old section 17 procedure contained in the Criminal Appeal Act 1968 and repealed in 1995.

It is hoped that the CRRC will mark a considerable improvement on the old section 17 procedure. It refers cases back to the Court of Appeal where there is a real possibility the Court of Appeal will allow the appeal. Critics have argued that the threshold for referrals is set too high and that more cases should be referred. Another criticism is that it cannot decide appeals, it can merely refer cases to the Court of Appeal.

Over a third of applications made to the CCRC are concerned with murder convictions and a quarter relate to sex offences.

“Some external commentators have advocated that the Commission should review cases faster by being less thorough, and should refer them more readily to the appropriate courts of appeal. Not referring cases that should be referred for lack of thoroughness, would perpetuate the very miscarriages of justice that the Commission was set up to review, and would be likely to result in resubmission of cases and judicial review. Referring unmeritorious cases would impose a costly burden on the courts of appeal. Such behaviour would rapidly diminish public confidence in the competence of the Commission, and in the wider criminal justice system.”

**Young Offenders**

Children under 10 cannot be liable for a criminal offence at all.