

The latest official diversity data, published in the *Judicial Diversity Statistics* (July 2018), indicates that the ranks of the profession are becoming steadily more diverse, but the pace of change is too slow for many campaigners. The President of the Supreme Court, Lady Hale, added to the debate in February 2018 when she called for 'affirmative action rather than positive discrimination' to achieve greater gender and ethnic diversity. For people to have full confidence in the impartiality of the application and administration of justice, judges, said Lady Hale, 'should be as reflective of the population as it is possible to be'.

Supreme Court case studies in 2018: impact and influence

One of the most fundamental powers of the Supreme Court is its ability to use **judicial review** to:

- **clarify the meaning of the law**, especially where disputes or inconsistencies occur
- **set legal precedents**, often by reviewing earlier legal precedent and re-establishing common law
- **review the actions of public officials or public bodies** to determine whether they have acted lawfully, often by issuing 'declarations of incompatibility' under the Human Rights Act (1998)
- **determine whether ministers or state bodies have acted *ultra vires***, i.e. beyond the statutory authority granted to them

Box 8.2 Case study 1: clarifying the meaning of the law

***Pimlico Plumbers Ltd v Smith* (2018)**

In June 2018, the Supreme Court upheld a Court of Appeal decision that a plumber classed as self-employed was in fact a worker. Gary Smith, who paid self-employed tax and was VAT registered, had 'worker status', meaning that he was entitled to various workers' rights such as sick pay, holiday pay and protection from discrimination.

The case hinged on the fact that Pimlico Plumbers required Mr Smith to wear a company branded uniform, to lease one of its vans displaying the company's logo and to work a minimum number of hours per week over a 6-year period.

In a ruling that will continue to have far-reaching consequences, the Supreme Court used its power of judicial review to **clarify the legal status** of workers in the absence of legislation that has kept pace with rapidly changing working practices. In this instance, the Employment Rights Act (1996) and Working Time Regulations (1998) were both enacted more than two decades ago and prior to the significant rise in flexible working within the so-called 'gig' economy.

Box 8.3 Case study 2: setting legal precedents

An NHS Trust v Y (2018)

In July 2018 the Supreme Court ruled that legal permission was no longer needed to withdraw treatment from patients in a permanent vegetative state. For more than 20 years, doctors have been required to seek approval of a court, usually the Court of Protection, in a process that can take months or years, and it costs health authorities about £50,000 in legal fees to lodge an appeal, even when relatives agree that withdrawal of treatment would be in the best interests of the patient.

The Supreme Court's ruling **changes established legal practice** in making clear that courts need not be involved in these sorts of cases, so long as doctors and families agree that withdrawal is in the best interests of the patient.

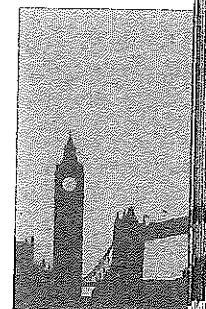
However, the judgement is a highly controversial one, dividing opinion and cutting across religious, moral and ethical beliefs. For supporters of the ruling, it removes an unnecessary bureaucratic obstacle at what is often a tragic time. For opponents, the ruling removes a vital legal safeguard for a small but extremely vulnerable group of people.

Box 8.4 Case study 3: reviewing the legality of parliamentary legislature

Steinfeld and Keidan v Secretary of State for International Development (2018)

Under the Civil Partnership Act 2004, only two people of the same sex may enter into a civil partnership. The Marriage (Same Sex couples) Act 2013 (MSSCA) made marriage of same-sex couples lawful. However, the CPA was not repealed when the MSSCA was enacted, meaning that whilst same-sex couples have a choice as to whether to enter into a civil partnership or to marry, different-sex couples do not.

In June 2018, the Supreme Court overruled a Court of Appeal decision, to rule instead that the Civil Partnership Act 2004 is **'incompatible' with the European Convention on Human Rights** as it applies only to same-sex couples and therefore amounted to discrimination. The case saw the Supreme Court use its power of judicial review to place significant pressure on the government to change the law and allow heterosexual couples to become civil partners. On 2 October 2018, Prime Minister Theresa May announced that the government would support legislation to guarantee the same rights for mixed-sex couples in civil partnerships.



Box 8.5 Case study 4: determining whether public bodies have acted *ultra vires*

The UK withdrawal from the EU (Scotland) Bill – a reference by the Attorney General and the Advocate General for Scotland (2018)

The UK Supreme Court was asked to rule on whether the EU exit bill passed by the Scottish Parliament in March 2018 was constitutional and ‘properly within devolved legislative powers’. As the UK government’s Brexit negotiations continued, the Scottish Parliament had sought to affirm its own rights, in formerly EU-regulated areas such as agriculture and fisheries, for when powers returned to the UK from the EU.

In April 2018, the UK government’s law officers, the Attorney General and the Advocate General for Scotland, referred the Scottish legislation to the Supreme Court. At the hearing in July 2018, Lord Keen, the Advocate General for Scotland, told judges that the legislation passed by Members of the Scottish Parliament (MSPs) in March was outside the competence of the Scottish Parliament.

By late November 2018 the Supreme Court had still not reached a verdict. Visit the Supreme Court’s website www.supremecourt.org for the latest information.

Have recent events demonstrated that the power and influence of the Supreme Court is growing?

Yes

Several factors have elevated the significance of the Supreme Court and the consequences of its rulings in recent years. There is little doubt that the growth in scope and scale of EU law and also the responsibility that judges have to make ‘declarations of incompatibility’ where parliamentary statutes conflict with the Human Rights Act have had the most bearing on Court power. These two elements have progressively drawn judges into the political arena seen most starkly by the rise in the number of rulings from its first full year of the Court in 2010 to 2018 (see Table 8.2).

Politicisation is the process by which individuals traditionally regarded as being above or beyond the party-political fray are drawn into it. In 2018 alone, the Supreme Court ruled on cases that some regard as the domain of special interests, such as on gay marriage, euthanasia, marital and parental rights and abortion, and ruled against the Ministry of Justice, the Metropolitan Police and Her Majesty’s Revenue and Customs (HMRC). Whilst the growing level of ‘independence’ and challenge to the political establishment in defence of civil liberties is welcomed by many, others have less support for the activities of an unelected and unrepresentative body in this sphere.

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Table 8.2 Number of Supreme Court rulings, 2010–18

| Year | Number of Supreme Court rulings |
|--------------------|---------------------------------|
| 2010 | 56 |
| 2011 | 79 |
| 2012 | 84 |
| 2013 | 98 |
| 2014 | 90 |
| 2015 | 83 |
| 2016 | 75 |
| 2017 | 109 |
| 2018 (to November) | 66 |

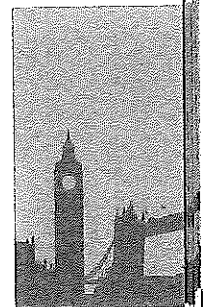
Source: www.supremecourt.org/decidedcases

No

It is important to note that because the UK does not have a codified constitution, despite perceptions of growing Court power, it remains impossible for the Supreme Court to ‘strike down’ Acts of Parliament or thwart the will of the government in the same way that the US Supreme Court can declare invalid Acts of Congress and force the president to back down.

The UK’s departure from the European Union will inevitably have an impact on the status and power of the Supreme Court. Withdrawing from the Treaty of Rome will mean that EU law will no longer take precedence over UK law. This will have the twin effects of removing a significant element of the Court’s caseload and also removing a court (the European Court of Justice) from its position of superiority over UK law. That said, many critics of the UK’s perceived ‘rights culture’ conflate the European Convention on Human Rights (ECHR) with the European Union. In reality, leaving the EU will not remove the UK’s obligations under the ECHR as the two are entirely separate.

For many long-standing commentators, the key cases that the Supreme Court has decided – in 2018 and previously – do not represent a significant departure from those decided by the Law Lords prior to the Court’s creation in 2009. The prediction by the first Court president, Lord Phillips, that the creation of the Supreme Court would be a change of ‘form rather than substance’ appears to have been largely borne out.



Comparison: UK and US Supreme Courts

For students studying comparative politics, there is a requirement to compare and debate the UK and US Supreme Courts and their resulting impact on politics and government, their relative powers, levels of independence and their effectiveness in protecting rights. There are a number of important areas of comparison and contrast when it comes to judges and courts in the UK and USA.

- The codified US constitution provides for far greater political significance where US judges are concerned. US Supreme Court justices are referred to as the 'guardians of the Constitution', as they frequently use their power of judicial review to clarify the meaning of the 230-year-old US Constitution in modern America. This means that responsibilities set out in the Constitution, such as the powers of the presidency, Congress and federal governments, are effectively determined by the US Supreme Court. The absence of a codified constitution in the UK means that the Court in the UK is seen largely as a legal body, rather than a political one.
- Nominations of Supreme Court justices in the USA are made by the president and confirmed by the Senate. The ideological balance of the Court is therefore affected by the ideological stance of the nominating president. The security of tenure enjoyed by justice in the USA means that presidential influence can last many years.

| Edexcel | Comparative Politics 6.2.7 | Comparing aspects of UK and US Supreme Courts and their resulting impact on politics and government; the relative extent of their powers and their levels of independence |
|---------|----------------------------|---|
| AQA | 3.2.2.3 | The similarities and differences of Supreme Courts; their impact on government and politics and the relative extent of their powers. A comparison of the relative independence of the judiciary in the UK and the USA |

Both specifications require knowledge and understanding of the extent to which rational, cultural and structural approaches can be used to account for these similarities and differences.

Summary

This chapter has dealt primarily with developments in the senior judiciary in 2018 – the changes to the composition of the Supreme Court that took place and the ongoing debate about the nature and scope of Court power. Students also require significant knowledge of how the three institutions of state – judiciary, executive and parliament – interact in the creation and the administration of the law, and further debates include:

- the extent to which the principle of the rule of law guides legislative and judicial activity
- the 'law-making' powers of judges as they set legal precedents through their interpretation of common law

- the preservation of judicial independence, and the nature and composition of the senior judiciary in preserving judicial neutrality
- the conflict that exists between the upholding of civil liberties and the enhanced protection of the public
- perceptions of the growing power of judges, in conflict with democratically elected governments

Further reading and research

- Read 'Has the UK Supreme Court changed anything?', Katie Shapiro, *Politics Review*, September 2018.
- Go to www.judiciary.uk and look up the summary of judicial diversity in the Judicial Diversity Statistics 2018.
- View the *Guardian's* Supreme Court page for up-to-date analysis on cases and decisions (www.theguardian.com/law/uk-supreme-court).
- Visit the Supreme Court's website for an understanding of the role of the Court and details on decided cases (www.supremecourt.uk).

