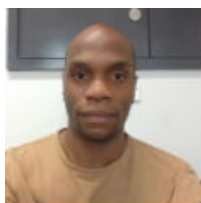


# Brexit, the separation of powers and the role of the supreme court



*The Supreme Court's role has changed since it was created. **Byron Karemba (University of Leeds)** looks at how Brexit is altering it further and makes the case for a new conception of the judicial function based on the separation of powers.*

When the Supreme Court of the United Kingdom (UKSC) was created, there was great emphasis by the architects of the Court that it would largely assume the same constitutional status and functions as the Appellate Committee of the House of Lords. For example, in the course of shepherding the [Constitutional Reform Act](#) through Parliament, Lord Falconer [insisted](#) that:

As to whether we envisage the Supreme Court having the power to give advisory opinions, no, we do not. Our legal system has never operated on the basis that hypothetical questions are put to courts. We should not see the courts as having an advisory function; they are bodies which resolve disputes between people [...] Nor do I believe it would be a particularly good idea for the Government to be able to refer issues to the courts for advisory opinions.

Of course this characterisation of the contemporary judicial function was a misnomer then, and if anything, time has proven that the UKSC is a different type of constitutional entity to the institution which preceded it. From the beginning, the transfer of matters arising from the devolution settlements from the Judicial Committee of the Privy Council to the new Court meant that the final appellate jurisdiction of this country was altered in constitutionally significant ways which are perhaps coming to the fore now. The UKSC recently concluded hearings on a reference by the Attorney General and Advocate General for Scotland (both UK Government Law Officers) on the compatibility of the [UK Withdrawal from the European Union \(Legal Continuity\) \(Scotland\) Bill](#) with the scheme of devolution to Scotland in the [Scotland Act 1998](#).



The library of the Supreme Court. Photo: [Ana Alfaro/ Supreme Court](#) via a [CC-BY-NC-ND 2.0 licence](#)

Thus, the exigencies of Brexit have ignited what is a rather dormant, but constitutionally sensitive part of the UKSC's jurisdiction. As noted by Christopher McCorkindale and Aileen McHarg on the [UK Constitutional Law Association Blog](#) in anticipation of these proceedings, this is the first time a legislative measure of the Holyrood Parliament has been referred for judicial scrutiny through the mode laid down in [s 33 of the Scotland Act 1998](#). Despite the devolution reference jurisdiction being previously invoked in respect of two Bills of the National Assembly for Wales, the combination of the proceedings' intrusion into the legislative process and their detachment from 'a dispute between parties' appear to militate against the traditional instincts about the judicial function emphasised by Lord Falconer in the House of Lords in 2004. However, this post argues that this aspect of the UKSC's jurisdiction is just but one element which requires us to reconsider the traditional conception of the judicial function, and concomitantly, how we configure the doctrine of the separation of powers as an analytical tool for understanding the relationship between the judiciary and the political branches.

## The traditional conception

In explaining the orthodox conception of the judicial function in the British constitutional tradition, materials from Australia are particularly instructive. As a function of the 'text and structure' of their [Federal Constitution](#) (and some State constitutions), the Australian judiciary has had to provide constitutive accounts of the judicial function which evidently build on shared theories about the nature of the judicial power. For example, in the aftermath of a controversy concerning the employment of judges on Royal Commissions in Victoria in the 1920s, the then Chief Justice of that State issued a Memorandum which captures this orthodoxy well. The [relevant part](#) of the so-called Irvine Memorandum explains:

The duty of His Majesty's Judges is to hear and determine issues of fact and law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. *There begins and ends the function of the judiciary.* It is mainly due to the fact that, in modern times, at least, the judges in all British communities have, except in rare cases, confined themselves to this function [...] Parliament, supported by wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy [emphasis supplied].

In this ideal, the necessity of 'issues of fact and law' arising in a dispute between conventional legal persons sets the scope in which the judicial function can be performed. And as evident in the latter half of the Memorandum, limiting the judicial function to this form has the related separation-of-powers benefit of insulating the judiciary from the 'region of political controversy.' Yet, as we witnessed in the proceedings relating to the Legal Continuity (Scotland) Bill, the devolution reference jurisdiction of the UKSC cuts across all three limbs of this view of the judicial function. Judicial decision-making in this context is removed from (1) issues of fact (2) arising in a dispute between legal persons, and of greater constitutional significance, (3) it makes provision for judicial intervention into the most supremely political contexts of all i.e. the legislative process of an elected Parliament.

Therefore, we can either deny the reference jurisdiction as being a proper exercise of the judicial function as has indeed been suggested by Jeremy Waldron, or we can construct an account of the judicial function which captures the expansiveness of the competence of the contemporary judiciary. In [Waldron's account](#), a mechanism such as the UKSC's reference jurisdiction 'amounts in effect to a final stage in a multicameral legislative process, with the court operating like a traditional senate.' While the idea of conceiving the Court as an extension of the legislature may have traction in this context given that judicial scrutiny of a legislative measure takes place before promulgation, Waldron's theory is handicapped by the fact that unlike a "traditional senate", the Court lacks powers of amendment or revision which would be common to a legislative chamber. Alternatively, as I argue below, we can conceive the reference jurisdiction as indicative of a new understanding of the judicial function.

## Constituting the new judicial function

The novelty of the devolution reference jurisdiction was made evident in 2012 when [the first ever reference](#) was made on the compatibility of two provisions in the Local Government By-Laws (Wales) Bill with the then scheme of devolution to Wales. Prompted by counsel for the Attorney General in that reference, the UKSC had to issue guidance on the procedure to be adhered to in these proceedings. This extended to consideration of whether the devolved legislatures could appropriately be designated as ‘respondents’ in these proceedings. We know from Lord Hope’s interpretation of the [Supreme Court Practice Direction 10](#) and [Rule 41 of the Rules of Court](#) that the ‘respondent’ – to the extent that this term has utility in this context – can either be a ‘relevant officer’ on whom a copy of the reference filed with the Court has been served, or a ‘relevant officer’ who registers an interest in the proceedings and does so within the prescribed temporal frame. As Lord Hope canvassed in the [Reference on the Local Government Byelaws \(Wales\)](#) Bill it is indeed possible to have a reference made to the Court in which no qualifying ‘relevant officer’ has an interest [92]. Furthermore, Lord Hope also made this noteworthy observation:

[P]roceedings on a reference under the devolution legislation are sui generis and the law officers appear before the Court in their capacity as a ‘relevant officer’ not as a conventional party or respondent [93].

This dispensing of the conventional setting in which the judicial function is exercised is symptomatic of the broader dynamism which inheres in the contemporary judicial function. The statutorily grounded mechanism to issue declarations of incompatibility under [section 4 of the Human Rights Act 1998](#) goes to the same point. In both contexts, the exercise of the judicial function is not concerned with ascertainment or declaration of pre-existing rights and liabilities between disputatious parties. In reality, the judicial function in both contexts is constructed around the determination of (legal) rules which are to guide the action of the branches of government themselves.

In the specific context of the devolution reference jurisdiction, this determination of legality takes place in the course of statutory interpretation which, [according to one jurist](#), ‘is both the primary and most important function of a supreme court.’ We know from Lord Nicholls’ speech in [R \(Jackson\) v Attorney General](#) that in our own constitutional arrangements, ‘statutory interpretation is properly cognisable by a court of law even [if] it relates to the legislative process’ [51]. It is this quest for an authoritative exposition of statutory provisions by personnel in the executive branch which gives rise to the judicial function in the context of the reference jurisdiction.

## Conceiving a new separation of powers

In a relatively recent [article](#), Masterman and Wheatle argue that the UK constitution is, and ought to be seen as amenable to some form of separation of powers analysis. My contention is that the shift in our conception of the judicial function should be reflected in this. The reference jurisdiction of the UKSC is just but one element which exemplifies this shift. In this new separation of powers, the ambit of the judicial power is framed by reference to an overarching principle of legality as opposed to the old assumptions about the form in which the judicial function is exercised.

*This post represents the views of the author and not those of the Brexit blog, nor the LSE. A version of this post first appeared on the [UK Constitutional Law Association Blog](#). It has been reproduced here with the permission of the editors.*

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