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Where do Justice Ginsburg and Justice Hale—and judicial independence—go from here?

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Both these influential and widely respected justices have recently tested the limits of judicial speech through provocative and ill-timed statements. Back in July, Justice Ginsburg exclaimed, “I can’t imagine what the country would be—with Donald Trump as our president”, then called Trump a “faker”, and even suggested that she may move to New Zealand if he won the election. Although she later apologised, her comments presented an obvious appearance of bias towards one candidate. Lady Hale, in a speech to Malaysian students last week, questioned whether Parliament may have to comprehensively replace EU legislation before the government could trigger Article 50. Although posed as a question in an impartial manner, the press jumped on the statement, which received a swift and angry reaction from Brexiteers; and indeed, others have acknowledged that the statements were controversial, and probably avoidable.

Of course significant differences between the statements from each Justice are apparent:

- Justice Ginsburg made a blanket statement about a presidential candidate (in this case, Presidential candidate Donald Trump)
- Baroness Hale spoke only about an impending case (Miller, which the UK Supreme Court will hear in December)

And yet, although the breadth of each statement is markedly different, both are troublesome. The fact that Lady Hale asked such a pointed question about an impending case is indeed disconcerting. The hearing is less than a month away, and the issue of Brexit and its implications has produced hostile responses from the citizenry on both sides of the issue. Lady Hale was obviously aware of the vicious reactions after the High Court decision in early November, and should not have been at all tempted to “stir the pot” on this matter. Even if only posed as a hypothetical, the remark about Miller comes as an unwelcome surprise for the UK judiciary. Conversely, Justice Ginsburg’s statements, while controversial, did not appear overly troublesome at the time: in July most polls had Mrs Clinton handily beating Mr Trump, and further, Justice Ginsburg has long been recognised as part of the Court’s liberal wing. That is not to say her statements were encouraged. Many lambasted

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1 In some ways writing this pains me, as I have deep respect and admiration for both Justice Ginsburg and Lady Hale, especially regarding the paths they have lead in breaking down gender barriers within the UK and US judiciaries.

2 This comes on top of the fact that the wife of Lord Neuberger, the President of the UK Supreme Court, was recently sending out anti-Brexit tweets (see http://www.independent.co.uk/news/uk/politics/brexit-latest-supreme-court-article-50-hearing-judge-lord-neuberger-wife-tweet-impartiality-a7427511.html). Lord Neuberger has also recently announced his retirement (see http://www.independent.co.uk/news/uk/politics/supreme-court-lord-neuberger-retirement-brexit-case-a7430331.html).
Ginsburg for her comments, and the issue of judicial speech rights became a national debate. But now that the election has swung for Mr Trump, the statements are much more significant, especially given the large amount of administration cases that come before the Court each term.

UK and US codes of judicial conduct

Both jurisdictions have codes of judicial conduct that come into play regarding these matters. Unlike in the UK, SCOTUS Justices are not bound by the Judicial Code of Conduct—a document that does bind the remainder of federal judges. Nevertheless, Chief Justice Roberts noted in 2011 that although immune from it, SCOTUS justices do consult it, and that it “plays the same role for the justices as it does for other federal judges”. A federal judge of over 36 years (23 of them on the Supreme Court, 13 of them on the DC Court of Appeals), Justice Ginsburg was certainly aware of Canon 5, concerning political activity. Specifically, provision 5(A)(2) notes that judges should not:

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office;

Indeed, the provision seems written for just this very case: beyond the explicit foray into political matters, one never knows when candidates for office—even long shot candidates—will triumph. Thus, purely from a legal perspective, judges are best to remain silent about such matters. But if the Code does play “the same role” for SCOTUS justices, as the Chief Justice asserts, then Ginsburg may face potential difficulties with Canon 3(C)(1)(a), which states that a judge should recuse himself or herself when:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Justice Ginsburg’s strong statements regarding Donald Trump implied that he was potentially dangerous for the country; a proposition that, both then and now, appears increasingly accurate...but that is beside the point. These were statements that should not have come from a judge, and especially not a respected and experienced Supreme Court Justice. A personal ‘bias’ or ‘prejudice’ against (now) President-elect Trump is at least perceived, and can be asserted against her for the duration of his presidency. But in the American context, such speculation is all for naught, as the US Code of Conduct, spectacularly, does not apply to members of the Supreme Court. Although Justice Ginsburg is unlikely to recuse herself from future Trump administration cases, she has needlessly given opponents material to question her independence in such matters.

As regards the UK, the situation is quite different. In 2009 the UKSC penned a Guide to Judicial Conduct that applies to the members of the Supreme Court, and includes a good amount of material relevant to Lady Hale’s situation. Section 3.4 is highly pertinent:

[T]he Justices recognise that it is important for members of the Court to deliver lectures and speeches, to take part in conferences and seminars, to
write and to teach and generally to contribute to debate on matters of public
interest in the law, the administration of justice, and the judiciary. Their aim is
to enhance professional and public understanding of the issues and of the role
of the Court.

Thus the Code acknowledges that such speeches are “important” and may “contribute
to debate on matters of public interest in the law”. This provision, generally, protects
Lady Hale’s speech.

Some have called on Lady Hale to recuse herself after her comments, a prospect she
has unambiguously refuted. And indeed, according to the Code, Lady Hale does not
appear to be under any obligation to recuse herself. In the ‘Bias and the appearance of
bias’ sections (3.7-3.16), recusal issues mostly revolve around relationships that the
Justices may have with those involved in the litigation before the Court (parties,
advocates, etc.). However, the Code in section 3.8 does acknowledge the following:

Circumstances will vary infinitely and guidelines can do no more than seek
to assist the individual Justice in the judgment to be made, which involves,
by virtue of the authorities, considering the perception the fair-minded and
informed observer would have. What follows are merely signposts to some
of the questions which may arise.

Although the situation as regards recusal is not limited to merely the stated
circumstances, it is still extremely difficult to make a strong case that Lady Hale
should recuse herself from sitting in Miller. After all, hypotheticals are hypothetical,
and are qualitatively different from direct political statements Justice Ginsburg
engaged in. That being said, there may be one provision under the ‘Integrity’ section
in which Lady Hale should give more credence to as regards her future speeches.
Section 4.2 states:

[T]he Justices accept that the nature of their office exposes them to
considerable scrutiny and puts constraints on their behaviour which other
people may not experience. They are conscious that it is a privilege to serve
the community in this capacity. They will try to avoid situations which might
reasonably lower respect for their judicial office, or cast doubt upon their
impartiality as judges, or expose them to charges of hypocrisy. They will try
to conduct themselves in a way which is consistent with the dignity of their
office.

Lady Hale was well aware of the extreme reactions following the High Court
decision, and she certainly would have been aware that any public statement on the
impending litigation could cause controversy. Thus any comments that could have
been perceived as biased—especially in these delicate times—were best avoided.

The perception of independence matters, and should be taken seriously

This is certainly not a new point, but in these polarised times, it bears repeating, as
even—and especially—prominent Supreme Court judges can push the envelope as
regards judicial speech. Standards—located either in codes or cases—should be
adhered to. Almost one century ago, in a lasting and influential UK judgment, it was
noted that it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” (see *R v. Sussex Justices, Ex parte McCarthy* [1924] KB 256). Although a bit romantic, this is absolutely a standard that every jurisdiction should strive to achieve.

Throughout the US presidential campaign and after the UK *Miller* decision much discussion revolved around upholding the rule of law. Given the implications of a Donald Trump presidency, and conversely, some of the outrageous responses after the UK High Court decision in *Miller*, that discussion was certainly warranted. But another pillar of the rule of law revolves around judicial independence, and if that is to be upheld, then judges must do their part.