Book Review

THE LEGACY OF RUTH BADER GINSBURG*

Scott Dodson ed

CHOO Han Teck
LLB (Hons) (National University of Singapore), LLM (Cambridge); Judge of the Republic of Singapore.

> [T]he conscientious judge will, as far as possible, make himself aware of [his] biases [of character]. Self-knowledge in this respect will prevent the judge from wrongly imagining that his decisions always pronounce universal truths.[1]

1 Ruth Bader Ginsburg (popularly and affectionately referred to as "RBG") was once rated by Harry Blackmun J after she presented oral arguments before the Supreme Court as "C+. Very Precise Female". The letter grades of Blackmun J are, naturally, vague and not very helpful, nor can they be objectively verified. But the quality of precision that RBG impressed him with has become a characteristic attribute of the small, quiet, lawyer who became the 107th Supreme Court judge in 1993, as an appointee of President Bill Clinton. She had been the co-founder of the "ACLU Women's Rights Project".

2 RBG was born on 15 March 1933. Her marriage to Martin Ginsburg, a tax lawyer, lasted 56 years until he died in 2010. They have a daughter and a son. Martin Ginsburg entered Harvard Law School in 1953 but his studies were interrupted on account of military service. He resumed his studies at Harvard in 1956. RBG also joined him that year. RBG would have been a Harvard Law graduate (which did not admit female law students until 1950) but for her husband's move to New York City. She applied for her final year to be completed at Columbia University but Harvard declined even though it had frequently granted similar requests to its male students. After she had graduated from Columbia, Harvard Dean Albert Sacks offered her a Harvard diploma if she were to renounce her Columbia degree. "I hold only one *earned* degree, [i]t is from Columbia. I treasure it and will have no other", she replied.[2]

---

* Cambridge University Press, 2015.

1 David Pannick, *Judges* (Oxford University Press, 1987) at p 46.

2 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 13.

3 She practised law for many years before becoming a Professor of Law at the Rutgers School of Law, and then moving on to teach at Columbia University. She was once rejected by Felix Frankfurter J as a law clerk on account of her gender – Frankfurter would not even give her an interview. That episode and her acute sensitivity to the marginalised spurred her to a career in practice and on the Bench, fighting discrimination. Like Sandra Day O'Connor J before her, RBG fought prejudice from her early years – Sandra Day O'Connor once went for an interview for a job as a lawyer but was offered one as a secretary instead. RBG's early life and early career are told in the first two chapters by Nina Totenberg and Herma Hill Kay respectively.

4 It seems implausible, but the Supreme Court had ruled that women had no constitutional right to vote.[3] That was in 1875. But it was only in 1971 that the Supreme Court ruled for the first time against arbitrary sexual discrimination in *Reed v Reed*[4] ("*Reed*"). RBG, as a professor in Columbia, helped with a brief to Allen Derr, counsel to Sally Reed who was fighting to be assigned as an administrator of her son's estate. Her husband whom she divorced challenged her application, telling her that she was "too dumb to handle it". The problem then was that where several persons were equally entitled to appointment, as was the case of the Reeds, the law provided that "males must be preferred to females".[5] The Supreme Court held that the Idaho Code's preference for males was arbitrary and sent the case back to the State court for determination on the merits.

5 In the years to follow, as counsel and later judge, RBG helped establish through her arguments the simple principle:[6]

> [E]ven when stereotypes about women's behaviour might accurately predict what might be expected from a *majority* of women, those women who did not fit the stereotype ought not to be ignored or unprotected. [emphasis in original]

Thus, when Antonin Scalia J queried counsel in *Flores-Villar v United States*,[7] "How do you separate stereotype from reality?" RBG answered instead, "There are people who don't fit the mold. So a stereotype is true for maybe the majority of women, [but that is not to say] this is the way women are, this is the way men are."[8]

---

3 *Minor v Happersett* 88 US 162 (1875).
4 404 US 71 (1971).
5 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 33.
6 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 39.
7 Case 09-5801 (13 June 2011).
8 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 41.

6 Despite the progress made, Linda Kerber in ch 3 notes: "Another large question remains: How does 'equal protection of the laws' apply to reproductive rights and access to abortion?"[9] The long-standing decision in *Roe v Wade*[10] was premised on the right to privacy. RBG's more astute and professorial mind would have preferred that decision to be grounded on the equal protection clause in the Constitution.[11] She had taken that approach not only in the *Reed* case, but subsequently, in the once little known brief that RBG wrote in the Supreme Court case, RBG set out her perception and analysis of the ambit of the equal protection clause in discrimination cases. That brief was written for *Struck v Secretary of Defense*[12] ("*Struck*"). That case involved a female Air Force officer who refused to have an abortion and was subjected to automatic discharge from the Force. RBG's arguments were lost in the archives because the Supreme Court eventually declined to hear the case. It is important because that was the case that made RBG think deeply and seriously about sex discrimination. The arguments were further refined in her arguments on the Bench. *Struck* is discussed in depth by Neil Siegel and Reva Siegel under the chapter "Struck by Stereotype".[13]

7 Whenever a woman makes a stand against sexual discrimination, she is seen as a feminist (yet another stereotype that RBG fights against). It is no wonder that she has been compared to another legal theorist, Catherine MacKinnon. But Joan Williams in her chapter in this book points out the important differences between the two: "Mackinnon's focus is on sex – one particularly unhealthy kind of sex: the eroticizing of dominance." RBG's focus "is on the separate spheres' organizations of work and family".[14] She consistently challenged the view that the "breadwinner" role is the natural role for men. Nonetheless, RBG adopts the "antisubordination" (a term invented by MacKinnon) theme throughout her jurisprudence.

9 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 41.

10 410 US 113 (1973).

11 That is why in *Gonzales v Carhart* 550 US 170 at 191 (2007), Ruth Bader Ginsburg points out that:

> … legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.

12 409 US 1071 (1972).

13 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 44.

14 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 61.

8 Her stand against discrimination extended to racial discrimination. In ch 6 Stephen Cohen discusses the important cases that RBG had a hand in shaping the law. One of her earlier and important opinion was her judgment in *Wright v Regan*[15] (when she was a District Court judge) in which she held that tax benefits to segregated private schools violated the equal protection clause. She was also clearly against of the way the majority in the Supreme Court misused the argument based on standing to deny the plaintiffs a remedy. The majority in this case held that the plaintiffs lacked sufficient interest in the outcome of the action. When she was again overruled by a 5:3 majority, William Brennan J, a dissenter, protested, using RBG's language: "Once again, the Court 'uses "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits"'."

9 In ch 7 Cary Franklin examined the importance of RBG and the case of *United States v Virginia*.[16] The Virginia Military Institute ("VMI") was a strictly all-male institution, based on the argument that "an all-male environment was integral to VMI's ability to accomplish its mission – that VMI simply would not be VMI if it were forced to admit female cadets". This case is important because RBG was still relatively new on the Bench in the Supreme Court but was asked to write the court's majority opinion. It also stands out as a clash in ideology between RBG and Antonin Scalia J. RBG's opinion not only answered the question placed before the court but also laid the groundwork for the application of the Fourteenth Amendment's equal protection clause. RBG felt strongly that the effect of exclusion was to deny women a career pipeline to positions of influence. That is the sort of subtle discrimination that RBG was acutely sensitive to – "the old boys' network", or any exclusive network of any kind, for these invariably smack of discrimination. Scalia J dissented on every point. Most importantly, he felt that the level of scrutiny against racial discrimination ought to be higher than sexual discrimination, but that is precisely what RBG is against. Race discrimination, in RBG's opinion, should be evaluated under the same set of constitutional principles as sex discrimination.

10 The focal strength and effort of RBG in her career may have been in the area of discrimination cases, and her role in criminal procedure (which is a substantive constitutional area in American law) thus appears subdued. Hence, Lisa Kern Griffin provides the view that RBG's impact in criminal law is subtle rather than subdued. In this field, RBG again utilises equal protection to ensure that there is meaningful access to criminal justice. It is an extension of her concern for fair

15 656 F 2d 820 (DC Cir, 1981); 468 US 737 (1983) as *Allen v Wright*.
16 518 US 515 (1996).

treatment in all the other realms of the law. Her concern in the criminal procedure is centred largely in lowering the barriers to criminal justice. In this, she maintains a clear, precise and consistent jurisprudence, preferring "a slow but steady forward motion" as her preferred speed on the Bench.[17] She belongs to the cautious school that advocates changing the law interstitially because that "affords the most responsible room[18] for creative, important jurisprudential contributions". Thus in *United States v Booker*[19] ("*Booker*"), RBG's main concern was the use of sentencing guidelines because that ran counter to her resistance to abrupt systematic change, and her view that it violated the Sixth Amendment. She strongly believes in the rule in *Brady v Maryland*[20] that requires the Government to disclose to the defence all evidence in its possession.

11 Aziz Z Huq discusses RBG's position with regard to the court's limits.[21] She believes that federal courts should only rarely "step ahead" of democratic sentiment, and not "sally forth each day looking for wrongs to right".[22] In the realm of criminal law, she believes that the courts ought to leave the freest hand to the Legislature. In the *Booker* case she was also of the view that "judges cannot be required by Congress or the federal Sentencing Commission to consider facts not proved to a jury, but they are nonetheless able to when they have the option of doing so". This odd effect is best explained by her belief in the space granted to judicial discretion where discretion is legislatively conferred.[23] She believes interjudge disparity in sentencing to be the lesser evil compared to the prosecutors' tendency to overcharge for the purposes of plea bargaining.[24]

12 Scott Dodson in ch 10 discusses RBG's views concerning the role of the court and the exercise of its jurisdiction. She abhors the use of jurisdictional grounds either as a means of dismissing a case or as a means of slogging through novel questions of law when a case can be dismissed on "straightforward persona-jurisdictional

17 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 104.
18 Christopher Slobogin, "Justice Ginsburg's Gradualism in Criminal Procedure" (2009) 70 Ohio St LJ 867 at 870.
19 543 US 220 (2005).
20 373 US 83 (1963).
21 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 117.
22 *Greenlaw v United States* 554 US 237 at 244 (2008).
23 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 127.
24 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at pp 131–132.

grounds".[25] Dodson discusses *Caterpiller v Lewis*[26] as an example of RBG's approach in this area. Paul Berman and Deborah Merritt's successive chapters deal with RBG's stand with regard to the interaction of legal systems and the federal *versus* state court jurisdictions. In both instances, RBG is against the intrusion of the court into areas that properly belong in the province of another institution with jurisdiction be it a state court, a foreign court, or the Legislature. She said in her confirmation hearing that:[27]

> Judges in our system are bound to decide concrete cases, not abstract issues; each case is based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives choose to present.

Thus, Tom Goldstein's chapter on the oral arguments in the Supreme Court seeks to amplify RBG's jurisprudential attitude. "Justice Ginsburg", he writes, "employs a variety of types of questions in ways that make oral argument enormously helpful for the Court as a whole."[28]

13 In the book's concluding chapter, Dahlia Lithwick describes RBG as "Fire and Ice" – the "least likely firebrand".[29] She is to women's rights what Thurgood Marshall was to the African-American's rights. Thus, Blackmun J's grading of RBG the counsel as "C+. Very Precise Female" was, in Lithwick's view:[30]

> … both perfectly accurate and also absurdly unperceptive. Precision and dispassionate logic were the most effective techniques Ginsburg had before the Court. The nine men she was attempting to persuade each believed themselves to be huge supporters of women. They cherished their wives and spoiled their daughters, after all. Some, like William J Brennan, were even able to write lofty prose about women's equality while holding antiquated views about women in private.

25 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 146.
26 519 US 61 (1996).
27 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 203.
28 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 221.
29 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 222.
30 *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed) (Cambridge University Press, 2015) at p 225; see also David J Garrow, "Justice Brennan, a Liberal Lion Who Wouldn't Hire Women" *Washington Post* (17 October 2010).

Ruth Bader Ginsburg, at age 81, is still fighting the battle for women's equal place at the table – calmly, precisely, and one step at a time.