Ruth Bader Ginsburg – Internationalist by Conviction*

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In Ruth Bader Ginsburg, the Supreme Court has not only lost an icon of gender equality and towering figure, but also a great internationalist. Ginsburg's jurisprudence was characterized by her own academic background as a proceduralist and comparativist, a decidedly international perspective, and a firm belief in a respectful and cooperative coexistence of legal systems.

Supreme Court Justice *Ruth Bader Ginsburg*[2] died on 18 September 2020 from complications associated with pancreatic cancer. Her death was mourned around the world. But it was all too quickly overshadowed by the search for her successor[3] which President *Trump* initiated just a few days later – against *Ginsburg's* express wish[4] and at great cost for the Court's integrity.[5] Still, the countless obituaries and tributes that have since been published are testimony to *Ginsburg's* outstanding importance, as a Supreme Court justice and as a public figure.

As far as her public image is concerned, *Ginsburg* is certainly best known for her fight for women's rights and gender equality.[6] With the retirement of *John Paul Stevens* in 2010 she also became the leading voice of the liberal wing of the Supreme Court and, through her powerful dissents,[7] a liberal icon known as "the Notorious RBG".[8]

In *Ruth Bader Ginsburg,* the Supreme Court has also lost a great internationalist. A renowned comparativist and proceduralist (I.), she not only promoted judicial restraint with regard to the separation of powers within the US,[9] but also argued reliably in favor of respectful cooperation between legal systems – in her jurisprudence (II.) and beyond (III.).

I. Ginsburg the Academic

Ginsburg's public perception has always been strongly influenced by her biography, including her own experiences of discrimination, which she had to endure in spite of all her academic achievements. It has been widely reported that *Ginsburg* was asked, being one of just nine female students in her year, to explain to the Dean of Harvard Law School why she was taking a place that would otherwise have gone to a man;[10] that she took classes for her husband when he was treated for cancer while also running the Harvard Law Review and taking care of their daughter;[11] that her request to finish her degree at Columbia Law School in New York, where her husband had started to work, was denied by Harvard so that she had to transfer to a Columbia degree;[12] and that Supreme Court Justice *Felix Frankfurter* refused to take her on as a clerk because of her gender, despite excellent grades and a recommendation by *Albert M. Sacks.*[13] *Ginsburg's* later work for the Women's Rights Project of the American Civil Liberties Union (ACLU)[14] that she had co-founded has also received extensive coverage.

Still, *Ginsburg's* internationalist outlook has arguably been most strongly influenced during the period *between* her clerkship, which she ultimately undertook between 1960 and 1962 with *Edmund L. Palmieri* at the District Court for the Southern District of New York,[15] and her taking up the position of the first female tenured professor[16] at Columbia Law School. *Hans Smit* had convinced *Ginsburg* to join his Project on International Procedure at Columbia in 1961, for which she became Associate Director in 1962. The project aimed to study foreign procedural law with the express aim to further the development of US law.[17] For this purpose, comparative studies of foreign procedural laws were conducted in close cooperation with practitioners from the legal systems in question. This allowed *Ginsburg* to travel to Sweden for several months, where she worked together with judge *Anders Bruzelius* and published two volumes on Swedish procedural law,[18] for which both of them received honorable doctorates from Lund University in 1965.[19]

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2 See generally Sherron de Hart, *Ruth Bader Ginsburg: a life,* Scribe Publications, 2nd ed. 2020; Carmon/Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg,* Dey Street Books 2015; regarding Ginsburg's work as a Justice at the Supreme Court, Gibson, *Ruth Bader Ginsburg's Legacy of Dissent. Feminist Rhetoric and the Law,* The University of Alabama Press 2018; Dodson (ed.), *The Legacy of Ruth Bader Ginsburg,* Cambridge University Press 2015.

3 The process was concluded with the confirmation of Amy Coney Barrett by the Senate on 26 Oct 2020 with 52 to 48 votes.

4 See Totenberg, "Justice Ruth Bader Ginsburg, Champion Of Gender Equality, Dies At 87", npr.org, 18. Sept 2020 (n.pr/3qdats9).

5 See Wiegandt, "Machtpolitik ohne demokratisches Ethos, Recht und Politik" 56 (2020), 531.

6 Gibson (n. 2), 1: "Since the early 1970s, Ginsburg has led the most profound attack on sexist law in the history of the United States."

7 The most famous example may be her dissent in *Ledbetter* v. *Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007), which was the basis for the first law signed by Barack Obama as president, the Lilly Ledbetter Fair Pay Act of 2009.

8 Totenberg, "Notes on a Life", in Dodson (n. 2), 3, 4: "the leading liberal voice of dissent on the modern Supreme Court."

9 Rubin, "Justice Ruth Bader Ginsburg: A Judge's Perspective", Ohio State Law Journal 70 (2009), 825, 829; Valentine, "Ruth Bader Ginsburg: An Annotated Bibliography", City University of New York Law Review 7 (2004), 391, 395. This approach is reflected in Ginsburg's criticism of the Supreme Court's landmark decision in *Roe* v. *Waede* 410 U.S. 113 (1973), concerning the absolute unconstitutionality of abortion bans: she argued that such a far-reaching decision was unnecessary given the particularly restrictive ban in question, rendering the development of a broader, democratically legitimated consensus on the right to abortion more difficult.

10 See Lithwick, "Fire and Ice: Ruth Bader Ginsburg, the Least Likely Firebrand", in Dodson (n. 2), 222, 223; Kay, "Ruth Bader Ginsburg, Professor of Law", Columbia Law Review 104 (2004), 8. Ginsburg explained that she wanted to support her husband in his studies.

11 See Totenberg (n. 8), 5; Kay, Columbia Law Review 104 (2004), 8.

12 See Kay, "Ruth Bader Ginsburg: Law Professor Extraordinaire", in Dodson (n. 2), 12, 13. Ginsburg refused a later offer by the Harvard Law School to replace the Columbia degree by a Harvard one with the words: "I have only one earned degree. It is from Columbia. I treasure it and will have no other."

13 See Rubin (n. 9), 825; Totenberg (n. 8), 5.

14 The aim of the project was to achieve an incremental extension of the equal protection clause of the 14th Amendment to gender-based discrimination through strategic litigation: see Franklin, "A More Perfect Union: Sex, Race, and the VMI Case", in Dodson (n. 2), 88, 91.

15 *Ginsburg* got this clerkship on the recommendation of Columbia professor *Gerald Gunther,* who threatened to never recommend another Columbia graduate to *Palmieri* and also promised him to find a replacement in case *Ginsburg* would not be up to the task.

16 Kay, Columbia Law Review 104 (2004), 2; Rubin (n. 9), 825.

17 See Fedynskyj, "Book Review. Civil Procedure in Sweden by Ruth Bader Ginsburg and Anders Bruzelius", Kentucky Law Journal 54 (1966), 816, 819.

18 Ginsburg/Bruzelius, *Civil Procedure in Sweden* (Martinus Nijhoff 1965); Bruzelius/Ginsburg, *The Swedish Code of Judicial Procedure* (Fred B. Rothman & Co. 1968).

19 Kay (n. 12), 14.

Her stay in Sweden not only gave *Ginsburg* an insight into a society that was far more progressive than the US on questions of gender equality and strongly influenced her later work in this area,[20] but also laid the foundation for her academic career. From 1963 on, she taught at Rutgers Law School. Classes included civil procedure, comparative law and conflict of laws. She also taught comparative seminars on Swedish law[21] and co-edited the American Journal of Comparative Law.[22]

Ginsburg's publications, too, were predominantly in these areas.[23] Until 1970,[24] she published several comparative texts, including two books[25] and several articles on questions of domestic and international civil procedure.[26] Many of these texts demonstrate not only *Ginsburg's* academic interest in the solutions found in other legal systems, but also her strong belief in international cooperation and the peaceful coexistence of legal systems.

In her paper, "The Competent Court in Private International Law: Some Observations on Current Views in the United States",[27] *Ginsburg* observed a convergence between the legal systems of the US and continental Europe regarding the need to base adjudicatory authority on a connection between the forum and the case or defendant that goes beyond mere service of the claim.[28] Still, she recognized that both systems left room for exorbitant, internationally undesirable heads of jurisdiction,[29] to which the *forum non conveniens* doctrine still offered "the most promising currently feasible remedy".[30]

In her tenure piece,[31] "Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments",[32] *Ginsburg* discussed how to determine which of conflicting judgments from different states is entitled to full faith and credit under Article IV, Section 1, of the Constitution. She criticized the practice of a number of state courts not to recognize judgments from a sister state when it contradicted an earlier judgment from the forum state, which she considered to violate the Supreme Court's case law.[33] According to *Ginsburg,* the argument that a sister state's judgment only demanded the same but no greater effect than a judgment from the forum missed the point; the Constitution required every state to consider all judgments as if they had been rendered in a single state.[34] This approach would still leave room for nuanced solutions to potential conflicts, which could even include a limited role for interstate anti-suit injunctions.[35]

Thus, when *Ginsburg* was appointed to the Court of Appeals for the District of Columbia in 1980, she had not only made her name as an advocate of gender equality but was also a respected proceduralist and comparativist.[36]

II. Ginsburg the Supreme Court Justice

Ginsburg's jurisprudence as a Supreme Court Justice was undeniably influenced by her former life as a scholar.[37] Many of the opinions she authored – including ground-breaking decisions such as *Virginia Military Institute (VMI)*[38] – contain comprehensive accounts of the existing case law that would be referred to by generations of lawyers.[39]

Over almost 30 years at the Supreme Court, *Ginsburg* not only got an opportunity to clarify herself the law regarding interstate anti-suit injunctions, as she had invited the Court to do in 1969,[40] but also influenced many other areas of conflict of laws. Her jurisprudence was marked by her international perspective[41] and her strong believe in respectful cooperation between legal systems. According to *Paul Schiff Berman,* her jurisprudence on cross-border cases demonstrates "a desire to maintain a functioning global legal order characterized by respect among different systems, productive interaction among those systems, and the maintenance of cooperative efforts to cut off regulatory evasion while recognizing difference."[42]

This is true, in particular, for three decisions from 2011 and 2014 through which the Supreme Court completely overhauled the legal framework of general jurisdiction over foreign legal persons. The very broad approach adopted in *International Shoe,*[43] according to which general jurisdiction would not require physical presence but could also be based on "minimal" (i.e. systematic and continuous) contacts with the forum, had previously remained unchanged for almost 70 years.[44] The Court first indicated a departure from this approach in its unanimous opinion in *Goodyear Dunlop Tires* v. *Brown*[45] authored by *Ginsburg,* emphasizing that general jurisdiction over a corporation could only exist in a place equivalent to an individual's domicile, i.e. "one in which the corporation is fairly regarded as at home".[46] In *J. McIntyre* v. *Nicastro,*[47] the Court unanimously denied general jurisdiction on this basis; it was split on the question of specific jurisdiction, though: Whereas the majority of six Justices denied jurisdiction on a number of different grounds, *Ginsburg* strongly criticized the majority in her dissent, which *Sonia Sotomayor* and

20 Kay (n. 12), 16. See also Dvorak, "Ruth Bader Ginsburg had to leave America to see how unfairly it treated women", *washingtonpost.com,* 24 Sept 2020 (wapo.st/3sMaqF9).
21 Kay (n. 12), 14–15.
22 Berman, "Ruth Bader Ginsburg and the Interaction of Legal Systems", in Dodson (n. 2), 151, 164.
23 See also Valentine (n. 8).
24 Around the same time that *Ginsburg* founded the Women's Rights Project and moved to Columbia, she also performed "stunning reversal of field" as an academic and started to focus on questions of gender equality: Kay, Columbia Law Review 104 (2004), 12.
25 Ginsburg (ed.), *Business Regulation in the Common Market Nations,* Vol. I (McGraw-Hill Book Co. 1969); Ginsburg, *A Selective Survey of English Language Studies on Scandinavian Law* (Fred B. Rothman & Co. 1970). See also Ginsburg, "Civil Procedure – Basic Features of the Swedish System", American Journal of Comparative Law 14 (1965), 336; Ginsburg, "Proof of Foreign Law in Sweden", ICLQ 14 (1965), 277; Ginsburg, "Nordic Countries, Service of Process Abroad", International Lawyer 4 (1969–1970), 150.
26 In addition to the texts cited in the following sections, see also Ginsburg, "Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States", International Lawyer 4 (1970), 720.
27 Rutgers Law Review 20 (1965), 89.
28 Ibid., 94–97.
29 Ibid., 97–98. As an example, she referred to competence based on the presence of an asset of the defendant under German, Austrian, and Scandinavian law.
30 Ibid., 98–100.
31 See Kay, Columbia Law Review 104 (2004), 12; Valentine (n. 9), 402.
32 Harvard Law Review 82 (1969), 798.
33 Harvard Law Review 82 (1969), 798, 812–819.
34 Ibid., 831.
35 Ibid., 828–832.
36 See Valentine (n. 9), 397.
37 See Kay (n. 12), 23–29.
38 *United States* v. *Virginia,* 518 U.S. 515 (1996).
39 Kay (n. 12), 29; Franklin (n. 14), 95–96. *Kay* compares *Ginsburg* to Chief Justice *Roger J. Traynor* of the California Supreme Court, whom conflict-of-laws experts may know for his contributions to the development of *Brainerd Currie's* governmental interests approach.
40 In *Baker* v. *General Motor Corp.,* 522 U.S. 222 (1998).
41 For influences of foreign and international law on her jurisprudence on questions of equality, see Farbstein, "Justice Ginsburg's International Perspective", Harvard Law Review 127 (2013), 429.
42 Berman (n. 22), 166.
43 *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).
44 See Adler, "Post Daimler: Weiterhin drohende US-Gerichtspflichtigkeit ausländischer Unternehmen", IPRax 38 (2018), 286, 287.
45 *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915 (2011).
46 *Goodyear Dunlop Tires Operations, S.A.* v. *Brown,* 564 U.S. 915 (2011), 924.
47 *J. McIntyre Machinery, Ltd.* v. *Nicastro,* 564 U.S. 873 (2011).

Elena Kagan joined, arguing that it would allow corporations to escape personal jurisdiction in the US by merely using a distributor that directs its activity towards specific states.[48]

The Court finally replaced the "minimum contacts" test by an "at home" standard in *Daimler AG* v. *Bauman*[49].[50] Writing for a majority of eight, *Ginsburg* explained that for a corporation, this standard would generally only be fulfilled by two "paradigm bases for jurisdiction": the place of incorporation and the principal place of business.[51] According to *Ginsburg,* this was not only justified by the defendant corporations' need for predictability[52] but also by the transnational context of the decision: as other states were usually following a more restrictive approach to general jurisdiction, the expansive views of general jurisdiction held in the past by some US courts constituted an impediment to the negotiation of international agreements on recognition and enforcement of foreign judgments.[53]

Ginsburg also emphasized considerations of international comity in other contexts – sometimes in direct opposition to the conservative wing of the Court.[54] In *Medellín* v. *Texas,*[55] for instance, a majority of 6–3 found that the conviction of the United States by the International Court of Justice in the *Avena* case[56] did not bind the US courts since none of the relevant treaties had been implemented into US law. *Stephen Breyer* on the other hand, in a dissent joined by *Ginsburg,* put an emphasis on the supremacy clause in Article VI, Clause 2, of the Constitution, according to which international treaties are hierarchically equivalent to federal law;[57] although this did not mean that any international treaty must be considered self-executing, the particular ICJ judgment was and accordingly bound the courts.[58]

Ginsburg also joined *Breyer's* concurring opinion in the landmark case *Kiobel* v. *Royal Dutch Petroleum Co.*[59] Basing the restrictive interpretation of the Alien Tort Claims Act on considerations of international comity and the interests of the international community, rather than on the general presumption against extraterritoriality, it is yet another testimony to a distinctly international perspective.[60] In her own dissent in *RJR Nabisco v. European Community*[61], *Ginsburg* consequently argued in favor of the extraterritorial application of the Racketeer Influenced and Corrupt Organizations (RICO) Act: "All defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States. [...] In short, this case has the United States written all over it." In such a case, the application of US law was perfectly reconcilable with the requirements of public international law.[62]

Finally, *Ginsburg's* firm belief in respectful cooperation between courts and tribunals, not only within her own legal system,[63] is also exemplified by the majority opinion she authored in *Intel* v. *Advanced Micro Devices.*[64] The wide discretion that the Supreme Court gave the lower courts with regard to requests for aid from foreign and international courts and tribunals under 28 U.S.C. § 1782 has since been used in a number of Circuits to give the parties to international arbitration access to discovery under US law.[65]

III. Ginsburg the Internationalist

Ginsburg's commitment to looking beyond the confines of her own legal system is not only present in her jurisprudence. It is also illustrated by a controversy involving several Supreme Court Justices in the early 2000s, which concerned the consideration of foreign and international sources when interpreting US law (which US courts actually do routinely)[66]. The views of the members of the Court differed radically. While *Antonin Scalia*[67] as well as *John Roberts* and *Samuel Alito* strongly argued against any such consideration in their respective confirmation hearings, *Ginsburg* and several other members of the liberal wing repeatedly took the opposite position.[68] After *Elena Kagan* was attacked in her own confirmation hearing for joining this position, *Ginsburg* came out in support and explained in a speech at the *International Academy of Comparative Law:* "National, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer [...] if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."[69]

Of course, even *Ginsburg* did not consider US courts to be directly bound by foreign sources. In her unanimous opinion in *Animal Science Products* v. *Hebei Welcome Pharmaceutical,*[70] for instance, she explained that statements by foreign governments on the content of foreign law can only have persuasive, not binding, authority for a US court. In *Monasky* v. *Taglieri,*[71] she based her interpretation of the term habitual residence in the 1980 Hague Abduction Convention on decisions in other treaty states, to which *Clarence Thomas* and *Samuel Alito* reacted with two con-

48 *J. McIntyre Machinery, Ltd.* v. *Nicastro,* 564 U.S. 873 (2011), 893.
49 *Daimler AG v. Bauman, 571 U.S. 117 (2014), on which see also the note by Metz, "Die aktuelle Einschränkung der US-amerikanischen Gerichtszuständigkeit durch den Supreme Court", IPRax 34 (2014), 365.*
50 See Adler, IPRax 38 (2018), 288; Metz, IPRax 34 (2014), 365, 367.
51 *Daimler AG* v. *Bauman,* 571 U.S. 117 (2014), 137.
52 *Daimler AG* v. *Bauman,* 571 U.S. 117 (2014), 139.
53 *Daimler AG* v. *Bauman,* 571 U.S. 117 (2014), 140–142.
54 See Reimann, "Das Ende der Menschenrechtsklagen vor den amerikanischen Gerichten?", IPRax 33 (2013), 455, 460.
55 *Medellín* v. *Texas,* 552 U.S. 491 (2008), 128 S. Ct. 1346.
56 ICJ, 31 March 2004 – *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America),* ICJ Rep. 2004, 12.
57 *Medellín* v. *Texas,* 552 U.S. 491 (2008), 128 S. Ct. 1346, 1377–1380.
58 *Medellín* v. *Texas,* 552 U.S. 491 (2008), 128 S. Ct. 1346, 1383–1389.
59 *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013), 133 S. Ct. 1659.
60 See Reimann, IPRax 33 (2013), 459–60.
61 *RJR Nabisco, Inc.* v. *European Community,* 136 S. Ct. 2090 (2016), on which see also the note by Buxbaum, "RICO's Extraterritorial Application: RJR Nabisco, Inc. v. European Community", IPRax 37 (2017), 106.
62 See Buxbaum, IPRax 37 (2017), 109–10.
63 See, in particular, *Ruhrgas AG* v. *Marathon Oil Company et al.,* 526 U.S. 574 (1999), 586: "[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design."
64 *Intel Corp.* v. *Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004).
65 See Sassine/Sim/Gore, "In Memoriam: How U.S. Supreme Court Justice Ruth Bader Ginsburg Influenced U.S. Perspectives on Arbitration and International Dispute Resolution", Kluwer Arbitration Blog, 10 Nov 2020 (bit.ly/3ejAtQ9), with further references to *Ginsburg's* jurisprudence in the field of arbitration.
66 See Minow, "The Controversial Status of International and Comparative Law in the United States", Harvard International Law Journal Online 52 (2010), 1, 2–3 (nrs.harvard.edu/urn-3:HUL.InstRepos:10511098).
67 See Waters, "Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue", Tulsa Journal of Comparative and International Law 12 (2004), 149, 151–153.
68 See Minow, Harvard International Law Journal Online 52 (2010), 5–7; Farbstein, Harvard Law Review 127 (2013), 431–432.
69 Ginsburg, "'A decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication", International Academy of Comparative Law, 30 June 2010.
70 *Animal Science Products, Inc., et al.* v. *Hebei Welcome Pharmaceutical Co. Ltd. et al.,* 138 S. Ct. 1865 (2018), on which see also the note by Hay, "Berücksichtigung von Aussagen ausländischer Regierungen zum eigenen Recht im US-amerikanischen Zivilprozess", IPRax 39 (2019), 169.
71 See *Monasky* v. *Taglieri,* 140 S. Ct. 719 (2020).

curring opinions, explicitly basing the same understanding merely on the wording of the treaty.

Still, *Ginsburg's* position was occasionally met with open hostility. In 2005, death threats against her and *Sandra Day O'Connor* were posted on the internet as a reaction to her liberal approach to international law.[72] Members of Congress discussed the impeachment of Supreme Court Justices who quoted foreign sources.[73]

And yet, *Ginsburg* remained an optimist. Her speech at the *International Academy of Comparative Law*[74] finished with the following words: "Recognizing that forecasts are risky, I nonetheless believe the US Supreme Court will continue to accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being [...] require trust and cooperation of nations the world over. And humility because, in Justice O'Connor's words: 'Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit.'"

It will fall upon lawyers on both sides of the Atlantic to continue making this belief a reality.

72 See Minow, Harvard International Law Journal Online 52 (2010), 7–8.
73 Ibid, 4.
74 N. 69.