

RUTH BADER GINSBURG IN THE FILM *ON THE BASIS OF SEX*. RADICAL REVOLUTIONIST OR THE RIGHT WOMAN AT THE RIGHT TIME?

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Abstract

This article on the film *On the basis of sex* (2018) uses a combination of legal and visual analysis with gender analysis to discuss the choices made by director Mimi Leder and director Daniel Stiepleman to visualise the life of late US Supreme Court judge Ruth Bader Ginsburg (RBG), in a film that shows elements of both the biopic genre and the (classic) courtroom drama. The *Moritz v. Commissioner* case, in which RBG argues her first case as a pleading lawyer offers a solid ground for the filmmakers to adopt film language, iconography and symbolism to portray not only RBG's life, but also the position of the female lawyer in the US in the seventies and the role of the law in a continuously changing society. As such, the film offers an insight in the initial motivation of RBG to become a legal activist for women's rights, while at the same time posing questions on what the law is, should be and whether (and to what extent) an individual has the power to change it.

Keywords

Ruth Bader Ginsburg. Law in film. Law as film. Female lawyer. Gender analysis.

Summary

1. Introduction; 2. Symbolism of the *Moritz* case: gender and society; 3. The courtroom scene: depiction of the law; 3.1. The court as theatre; 3.2. The painting; 3.3. The inscription: "Reason is the soul of all law"; 3.3.1. 'Reason' in *stare decisis*: the *ratio decidendi*; 3.3.2. 'Reason' as *ratio legis est anima legis*; 3.3.3. Reason in common law; 3.3.4. 'Reason' as *ratio* versus emotion; 4. Women in film: hesitation in court; 5. RBG as the victor?; References.

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1. Introduction

On the Basis of Sex tells the biographical story of Joan Ruth ‘Kiki’² Bader, a young Brooklyn woman who, along with her husband Marty Ginsburg, would win her first court case in the 1970s. The case involved a single man Charlie Moritz who cared for his mother at home and was denied a tax break to compensate for that care, based on his gender. It is the first case that Ruth Bader Ginsburg (hereafter: RBG) argued as a pleading lawyer and the beginning of a long battle against gender discrimination.³ As such, the film qualifies as a biopic because the story is fairly accurately based on RBG’s life.⁴

At the same time *On the Basis of Sex* also has elements of a courtroom drama: it builds to the climax of a courtroom scene in *Moritz v. Commissioner* and much of the film focuses on the legal reasoning that will be used in that case.⁵ This paper examines how the law and the role of the woman and activist lawyer are visualised in the film.

It must be noted that the words ‘sex’ and ‘gender’ are sometimes used as synonyms throughout the film. As RBG’s secretary hands over the full dossier of the *Moritz* case to RBG, she

² BADER GINSBURG 2016, 1.

³ FILIPOVIC, Jill, “Ruth Bader Ginsburg didn’t solve sexism in America. But she died trying”, *The Guardian*, 23 September 2020, <https://www.theguardian.com/commentisfree/2020/sep/23/ruth-bader-ginsburg-didnt-solve-sexism-in-america-but-she-died-trying?ref=hyper.com>. Accessed 09/07/2021.

⁴ SCOTT, Anthony Oliver, “On the Basis of Sex Review: How Ruth Bader Ginsburg Became ‘Notorious’”, *The New York Times*, 24 December 2018, <https://www.nytimes.com/2018/12/24/movies/on-the-basis-of-sex-review.html/>. Accessed 07/07/2021.

⁵ MACHURA & ULBRICH 2002, 117.

proposes to change the word 'sex' for 'gender', because she thinks 'sex' sounds too harsh. 'Sex' refers to the anatomical or chromosomal categories, 'gender' generally refers to the socially constructed roles related to the sex distinctions.⁶ While the film title refers to discrimination on the basis of sex, many of the discriminations displayed throughout the movie could be described as gender discrimination. It could be interesting to do further linguistic research on the use of the two terms in this film. However, the scope of this article is restricted mainly to an analysis of the visual elements and will thus use the terms as used in the film.

2. Symbolism of the *Moritz* Case: gender and society

The opening scene of the film shows a large sea of white men in suits marching into Harvard Law School in 1956, accompanied by the song "Ten Thousand Men of Harvard"⁷ and one woman in a blue dress (Ruth Bader Ginsburg), standing out in the crowd. This image is immediately indicative of the rest of the film: the legal institutions filled with white-collar men and guided by traditional values discriminate against women, and Ruth Bader Ginsburg tries to do something about this.

The final scene implies that RBG (partly) succeeds in pursuing change: not the actress, Felicity Jones, but the real Ruth Bader Ginsburg, by then already in her mid-90s, walks, dressed in her blue dress, up the steps of the Supreme Court building, where

⁶ WALKER & COLLINS 1998, 255.

⁷ PUTNAM, Alfred & TAYLOR, Murray, "Ten Thousand Men of Harvard", performed by Harvard University Band, Harvard Glee Club, 1918.

"Equal Justice Under Law" is chiselled in large letters. The real RBG was also closely involved in the rest of the filming process, as her cousin Daniel Stiepleman wrote the script in consultation with her. RBG herself judged the final result and approved it.⁸

Between these two scenes, the story is told of RBG, who from 1956 to 1972 is preparing for her first court case: *Moritz v Commissioner of Internal Revenue*.⁹ The choice to portray only this case is particular, within the genre of the biopic, as this is a genre traditionally used as a way of portraying the life story of significant figures.¹⁰ By depicting only a slice of RBG's life, one gets to see only a small part of what she has meant to history. The rest of her life is described right before the credits in a few interlocking lines: she was one of the leading gender rights lawyers of her generation, she won several landmark cases that would be important as precedents for later (gender) cases, and she herself was later appointed Judge of the Supreme Court of the United States. Although at first glance this does not seem to be what one expects from a biography in film form, the biopic as a genre is a way of uncovering a biographical truth, rather than a mere enumeration of factual events.¹¹

In this sense, the narrative of the film can be seen as a deeper look into the motivation that led RBG to start her long struggle with

⁸ BRYANT, Kenzie, "What the New Ruth Bader Ginsburg Film Gets Wrong, According to R.B.G.: 'I Never Stumbled'", *Vanity Fair*, 17 December 2018, <https://www.vanityfair.com/hollywood/2018/12/ruth-bader-ginsburg-felicity-jones-armie-hammer-on-the-basis-of-sex-new-york-screening>. Accessed 07/04/2021.

⁹ *MORITZ v. CIR*, 469 F. 2d 466- Court of Appeals, 10th Circuit 1972; https://scholar.google.com/scholar_case?case=11568697307639967604&q=charles+moritz&hl=en&as_sdt=2006. Accessed 09/07/2021.

¹⁰ CUSTEN 1992.

¹¹ BINGHAM 2010.

gender discrimination. After all, she saw her opportunities to pursue a career as a lawyer being cut short when she graduated top of her class from Harvard and Columbia, but got rejected after every job interview she did and failed to get a job as female lawyer. It is interesting to note here that director of the film Mimi Leder¹² too had her own struggles with gender discrimination throughout her career. She was the first woman to graduate from the AFI Conservatory and broke the glass ceiling in Hollywood, directing a \$50 000 000 action thriller. After winning two Emmy's and working with Steven Spielberg, she wasn't invited to Hollywood studios anymore after being heavily criticised in 2000 on her film *Pay it Forward*. *On the Basis of Sex* is her first feature film since then, after eighteen years of trying to get out of 'the movie jail' she was put in as a female director.¹³ Because of her own experience as a female pioneer in her industry, Leder felt like she immediately understood the struggles RGB went through while reading the script for the first time: she was the right woman in the right place to visually translate the script into a film.¹⁴

An obvious parallelism with RBG is Martin (Marty), her husband who is offered a promising job as tax lawyer in New York

¹² <https://www.imdb.com/name/nm0001460/>.

¹³ SPERLING, Nicole, "The Long Road from *Pay it forward* to Ruth Bader Ginsburg: Inside Director Mimi Leder's Return to the Big Screen", *Vanity Fair*, 2018, <https://www.vanityfair.com/hollywood/2018/09/director-mimi-leder-on-the-basis-of-sex>. Accessed 07/07/2021; ROCHLIN, Mary, "For Mimi Leder, Persistence Pays Off", *Directors Guild of America*, 2018, <https://www.dga.org/Craft/DGAQ/All-Articles/1802-Spring-2018/DGA-Interview-Mimi-Leder.aspx>. Accessed 07/07/2021.

¹⁴ See "The Basis of Sex", interview Justin Theroux & Mimi Leder, at *Talks at Google*, <https://www.youtube.com/watch?v=GbYPMIM6XpY> (01:34-02:42). Accessed 07/07/2021.

almost immediately after graduating. Apart from this visual parallelism, Leder also translates the criticism on the exclusively male role of the lawyer in several other scenes throughout the film: obviously in the opening scene, where RBG is the only woman in a stream of Harvard men, but also in the two elevator scenes in a law office, where she is the only woman. In the law school where she teaches, she has a female secretary and when she is discussing gender equality in the workplace with the militant Mel, the president of the ACLU (American Civil Liberties Union), a female co-worker comes to serve them coffee. We also see two fragments where the wife of the dean of the Harvard Law School sits quietly and meekly next to him, listening. With these passages, Leder clearly wants to make a visual point: lawyers are not women.

Accordingly, it is her husband who presents her with the legal case which will be her break-through as a pleading lawyer and which is the main topic of the film. The facts of the case are as follows: Charlie Moritz, who stays at home to care for his mother, deducts these costs for her care from his taxes. Although Section 214 US Tax Code allows this for women, divorced men and widowers, Moritz is denied this option because he does not fall within any of these categories. The legislator's reasoning for Section 214 was that men should work outside home and women should stay at home to take care of the family. Since men who divorced or became widowers were forced to take on family care tasks, they were allowed to profit from this reduction. RBG uses this case to demonstrate that the law discriminates on the basis of gender and to set a precedent for future case law. The case is symbolic on two levels.

First, the victim of the discrimination is a man, while it is discrimination against women that motivated RBG to become a lawyer.¹⁵ This is the only case she knows of that treats men as negatively as women, which she hopes will make the male judges realise that there is such a thing as gender discrimination. It comes as no surprise that one of RBG's feminist leading idols is Simone de Beauvoir, who quotes Poulain de la Barre at the beginning of her book *'Le deuxième sexe'*: *'Tout ce qui a été écrit par les hommes sur les femmes doit être suspect, car ils sont à la fois juges et partie'*.¹⁶ The biopic seems to be a visual translation of this quote, given that the case around which the entire film revolves will serve as a basis for denouncing laws that discriminate against women, but both the party and the judges in the case are men.

Secondly, it is quite unique to see a courtroom drama about tax law. The classical elements of the genre, such as the jury and (often gruesome) punishments, are exchanged here for a branch of the law that is not as triggering to the imagination. At first glance, it is quite a meaningless case about a small financial amount of just \$296,70.¹⁷ However, as RBG's husband Martin Ginsburg asks his colleagues while showcasing his tax knowledge at a reception: 'How

¹⁵ This appears from a discussion she has with her husband Marty: 'Then I want you to walk me home, Marty, so I can sit in my corner and write a lesson plan to inspire the next generation of students to go forth and fight for equality.' I don't understand why you're acting like that's such a bad thing. You're out there training the next generation of lawyer to change the world!' 'Because that's what I wanted to do!'

¹⁶ 'Everything that's written by men about women must be suspect, because they are at the same time judges and party', DE BEAUVOIR 1976, 4.

¹⁷ REILY, Peter, "On the Basis of Sex"- What to Read Before You Watch", *Forbes*, 2018. Reily cites Martin Ginsburg on the Moritz case. See also: the brief in Moritz/Commissioner, 9.

a country taxes its citizens, is a direct declaration of a countries' values... What could have more impact than that?' This approach to bringing a discrimination case based on tax law is also challenged in the film itself: 'if a lawyer like Dorothy Kenyon failed to challenge a discriminatory law in a murder case, RBG certainly wouldn't be able to prove discrimination in a tax case', says Mel from the ACLU. He refers to the case of *Hoyt v. Florida*, in which the feminist lawyer Dorothy Kenyon pleaded for her client to be given a jury of "peers" instead of the all-male (and white) jury that convicted her of murder.¹⁸ Not only is Kenyon often referred to in the film, she also appears as a character in it. Kenyon wears a prominent hat in the scene, which is symbolic of the economic empowerment for women that both Kenyon and RBG are fighting for. The hat is an explicit reference to Kenyon's teachings in the 1930s in which she often emphasised how 'the hat that sits upon my head, which I have bought and paid for' symbolised female freedom.¹⁹

By taking up the *Moritz* case, RBG brings the discourse of gender equality into the context of tax law. The fact that the biopic takes this case as its focus seems to tell us that by doing this, she is adding the issue of gender discrimination on the state's priority list, as taxes are a direct statement of the state's values.

3. The courtroom scene: depiction of the law

¹⁸ 119 So. 2d 691 (1959), Gwendolyn Hoyt/State of Florida.

¹⁹ BARBAS 2009, 424.

3.1. The court as theatre

As if it were a theatre play, where one can watch behind the scenes as the actors prepare for the performance, one can see the tension rise before the mirror in the bathroom where RBG practices her introduction before leaving for court. The whole film builds up to this courtroom scene.

The viewer immediately notices that RBG is wearing a black vest with a white border for her plea, representing the collar of a suit. In this outfit, we recognise the classic tight white collars associated with the Harvard Law students who represent the male (and white) symbols of America's prestigious legal institution at the beginning of the film. This visual element shows us that RBG, although she does not agree with the institution, she still pursues the values of the Harvard Law School Student, mentioned by Dean Griswold: 'A Harvard Law student is intelligent of course, but he is also tenacious. He is a leader devoted to the rule of law. He is mindful of his country, loyal to tradition and he is respectful and protective of our institutions.'

3.2. The painting

When entering the court and during the proceedings, a large painting hanging on the wall of the court is shown several times. This painting depicts the myth of Achelous and Hercules and was realised in the 1947 by Thomas Hart Benton, a controversial painter who is

seen as a founder of the 'American Scene' movement.²⁰ Painted in a time when American agriculture was honoured under Truman's Marshall Plan and the Missouri river was under construction to create more fertile farmland, the mural seems to be a representation of the abundance of American agriculture.²¹

The painting shows Achelous and Hercules, fighting for the hand of Deianira, daughter of Calydonian King Oeneus.²² Achelous is the God of rivers, who relies on his rhetorical abilities and wit to convince Oeneus to offer him his daughter's hand. In the battle with Hercules, Achelous transforms himself into a bull, whose horn Hercules breaks off and is offered as a trophy of his victory to Deianira. The bull's horn turned into a horn of plenty or cornucopia, which came to symbolise fertility.²³ Although the horn frequently appears in courtroom scenes of justice, Benton understood the myth as representing his beloved Midwest. It seems to be a celebration of the American Nation that according to Benton seems to be strongly intertwined with natural elements.²⁴

The painting itself was commissioned to Benton in 1946 for a Kansas City department,²⁵ hung there until 1984,²⁶ and since then it

²⁰ Often described as 'Regionalists', Benton and two other American painters John Stuart Curry and Grant Wood were the first to focus on (working-class) American subject-matter, ADAMS 2003, updated and revised in 2015.

²¹ <https://americanart.si.edu/artwork/achelous-and-hercules-1910>. Accessed 07/07/2021.

²² SECCI 2009, 34.

²³ CURTIS & RESNIK 1987, 1740-1742; Benton used the version of chapter 23 of Bulfinch's *Mythology* as inspiration.

²⁴ <https://americanart.si.edu/artwork/achelous-and-hercules-1910>. Accessed 07/07/2021.

²⁵ BROWN, 1987, 73.

has been on display at the National Museum of American Art in Washington. That this painting hang in the courtroom in Denver in 1972 is thus an interpretation of the filmmakers. Moreover, this scene was actually shot in the Court of Appeals in Canada.²⁷

The myth represented is interesting in the context of the legal proceedings with which it is associated in the film, as it gives the court proceedings in the room the connotation of a battle. This is reinforced by the fact that the same shot with the painting in the background appears three times, with each party speaking: with Martin Ginsburg, with RBG and with Bozarth, the attorney for the United States. It is as if they each get a turn in the fight, just as Hercules and Achelous each take turns at each other in the regulated battle for the daughter's hand. Moreover, the battle between Hercules and Achelous is a fine display of power between two strong men, fighting for the hand of a woman who has absolutely no say in her own fate as a future wife. Thus, the choice to display this picture visually in the background seems to be a visual argument by the director to say that according to the social values of the time, RBG as a woman does not belong in court.

Another, somewhat more farfetched interpretation of the painting's presence is the myth's connection with the equality of weapons. Although the fight between Achelous and Hercules was regulated and thus they probably had to use equal weapons in battle, both can use their own abilities in battle. For example, Achelous can turn himself into a snake and a bull, and Hercules is as strong as a mountain. Although both sides in court use their rhetoric skills to

²⁶ <https://kchistory.org/islandora/object/kchistory%253A108843>. Accessed 07/07/2021.

²⁷ <https://www.moviecloci.com/6031-On-the-Basis-of-Sex>. Accessed 07/07/2021.

convince the judges, the government does not fight with equal weapons. After all, they use computers, which were then only available to the Minister of Defence, to print out a list of all laws that discriminate on the basis of sex and add them in an Appendix to their brief²⁸. The other side, RBG and company, have to go through these laws manually one by one, which takes them considerably more time and effort. The fact that the computers with which Bozarth shapes his legal arguments belong to the Ministry of Defence really gives it the connotation of being a weapon. Despite this uneven fight, Hercules manages to go through the list and win from Achelous, who will bite in the dust relying on his natural powers.

3.3. The inscription: 'Reason is the soul of all law'

When the parties step into the court, both Mel, ACLU leader and RBG stand in awe of the maxim, written in large letters above the judge's bench: "Reason is the soul of all law". In one long shot the slogan is explicitly displayed from left to right.

3.3.1. 'Reason' in stare decisis: *the ratio decidendi*

A first interpretation of the word 'reason' refers to the system of *stare decisis* or precedent of the common law.²⁹ American common

²⁸ This is the summary of the written arguments in a lawsuit.

²⁹ EHRCKE 1995, 847.

law is open-ended in the sense that new extensions of existing law rules can be discovered by the courts in their jurisprudence.³⁰ A judge can refer to a precedent when the present case has similar legal and factual circumstances as those in the precedent. On this basis, a judge can also apply the decisive applied rule from the precedent, the *ratio decidendi*, to the case at hand.³¹ The idea behind *stare decisis* is that it guarantees a gradual evolution in jurisprudence with a certain degree of certainty and predictability. This traditionally evokes the idea that common law always relies on previous precedents and thus that today's society is legally regulated by old or outdated decisions. This apparent conservatism in law is translated in the film into the image of the three white or grey judges, who have already set many precedents. Although Bozarth, the representative of the prosecutor's office is a young lawyer, he too fits completely into this conservative image of common law when his boss instructs him: 'You've got a century of case law on your side, just do your job'.

At the same time, one can also see the *ratio decidendi*, which successive judges apply in similar cases, as the organic link between successive generations.³² Thus, *ratio decidendi* also has a mystical connotation, because its recognition and delineation by a judge is a deep secret of judicial life.³³ What is it that makes a case in a changing society have the same circumstances as those from which the *ratio decidendi* originates? This mystique is reflected in the word 'soul'. RBG wants to point out to the judges that in judging the *ratio decidendi* they must not lose sight of that function as a link between

³⁰ STEIN 1991-1992, 1596.

³¹ STONE 1959, 598.

³² *Ibidem*, 602.

³³ *Ibidem*, 612.

generations, whereas Bozarth wants to preserve as much as possible of the link between this case and the old generations. How the judges will rule on ‘the reason of the law’ remains a question mark at that point.

3.3.2. ‘Reason’ as *ratio legis est anima legis*

A second possible reading of the maxim above the judges in the Tenth Circuit Court in Denver is that the ratio is the core of the law that must be found by judges over time and applied to the facts before them. What RBG wants to demonstrate in *Moritz v. Commissioner* is that the *ratio decidendi* of earlier precedents discriminating against women do not apply in the case before it. In that sense, the maxim should be read as an encouragement for RBG to convince the judges that the *ratio decidendi* of existing precedents (‘law’ should be read here as case law) that Bozarth wants to use does not apply in the present case. Her aim is to create a new precedent, because it is time for the new generation.

This reading of ‘reason’ is closely related to the adage *ratio legis est anima legis*. This builds on one of the main principles of the common law: ‘when the reason for a law ceases, so ceases the law’.³⁴ As RBG argues, the purpose of the present Section 214 was not to protect women, nor to discriminate against people, but merely to allow carers to work outside home.³⁵ In such a case, she argues, the

³⁴ WU 1959, 298.

³⁵ ‘The principle purpose of Section 214 is not to protect women, nor to discriminate against men. It is to provide caregivers the opportunity to work outside the home.’

court must reconcile the law with its legislative purpose: ‘Extend the deduction to never-married men. Help all caregivers equally’. The fact that RBG applies this concrete common law principle in the specific present case gives the whole thing an ironic touch. After all, RBG only has to read her legal argument off the court’s wall. It is as if her plea finds its legal basis in the walls of the court, which are a representation of the institutional judiciary itself. The long shot of the inscription symbolises that she has the law on her side.

3.3.3. *Reason in common law*

The legitimacy of RBG’s argument goes beyond the law finding form in the judiciary. Law in its natural law form is also on the side of RBG as the representative of a new generation. Reason is after all an aid to learning the laws that govern the natural order. Thomas Aquinas wrote in the thirteenth century that natural law or ‘natural reason’ was nothing more than the sharing of the Law by intelligent beings.³⁶ Sir John Fortescue, one of the important political theorists of the fifteenth century wrote ‘Common reason is the common law’.³⁷ Although this idea was initially divinely inspired, in the seventeenth century the prominent common lawyer Lord Edward Coke gave it a new interpretation.³⁸ He said that ‘the life of the Law’ is a perfected form of ‘reason’ which one can only acquire through

...Court should fix the law most in line with the legislative intent. Extend the deduction to never-married men. Help all caregivers equally.’

³⁶ AQUINAS, 799.

³⁷ LOCKWOOD 1997, p. xv.

³⁸ HOLDSWORTH 1935, 332.

long study and experience.³⁹ Reason, in other words, is the ability of people practising law to deduce Natural Law. Throughout the film hints are given to this interpretation: one sees RBG sunk into her thoughts reading a book or tapping away at her typewriter through the night, while she finishes both the assignments of herself and her sick husband Marty, who suffered from cancer for a while.

Her professor's lesson also fits in this framework: 'Judges are not led by the weather of the day, but will be by the climate of the era'. This quote is said three times by RBG. Once when it is snowing, once when it is raining and once when it is very dark outside. However, when RBG and her family climb the stairs of the Tenth Circuit Court, the sun is shining. It seems to forecast the outcome of the plea: today the weather might have an impact on the judges.

While they enter the courthouse, it is also striking that RBG is in the lead, closely followed by government representatives. This image shows us: this is the new generation. This motif comes up earlier in the film when RBG convinces Mr. Moritz to plead his case: 'you're the man marching ahead of the band, leading the way.' That RBG is marching ahead and the sun is shining is a clear message from Nature: it's time for a new interpretation of the law, RBG's interpretation.

The arguments that Bozarth cites also rely on 'it's the natural order of things', but the viewer already knows from the given visual clues that these arguments will fall apart. After all, the old traditional interpretation of law was symbolically rejected earlier when Moritz refused to have his case settled amicably for a dollar. The paper of

³⁹ SINGER 1983, 806-807.

that failed amicable settlement symbolises an outdated social contract, in which the value of a man staying at home to look after his mother is estimated very low. Moreover, the government also underestimates the female lawyer, who represents the new ideals, because it assumes that she will conform to the old ideals.

‘We’re not asking you to change the country’, says RBG to the sitting judges in *Moritz v. Commissioner*, ‘That’s already happened without any court’s permission. We’re asking you to protect the right of the country to change.’ She refers here, among other things, to the large group of students protesting in front of Rutgers University against the Vietnam War to the tones of the song ‘Time has Come Today’.⁴⁰ The image of this demonstration stands in stark contrast to the great stream of men marching to Harvard’s battle song ‘Ten Thousand Men of Harvard’. It symbolises the long history of male white-collar lawyers conforming to the traditional values of law as a prestige study. Moreover, it also stands for the societal values that have changed: male and female law students of different skin colour come together to protest for their ideals, a new interpretation of traditional societal values.

3.3.4. ‘Reason’ as ratio versus emotion

A final possible reason that explains why both Chairman Mel and RBG seem so mesmerized by the engraved maxim is the contrast between reason and emotion, a subject of disagreement between the two characters. Throughout the film, emotion and RBG’s struggle

⁴⁰ THE CHAMBERS BROTHERS, “Time Has Come Today”, 1996.

with expressing this is an important motif. When RBG gets all wound-up in a mock trial in preparation for the case, everyone averts their eyes in shame. Then Mel says: ‘Look, when you were a kid you were pretty and you were smart as a wit, but you're coming across as this bitter, unlikeable shrewd that I don't even recognize. And if that's who shows up in Denver,⁴¹ you will blow it... And would it kill you to smile?’

A good lawyer does not get emotional. Moreover, emotion is linked to something inherent in women. At a job interview, Ruth says she was rejected the week before because women are too emotional, but at the same time she was told that a woman who graduates top of her class would probably be ‘a real ballbuster’ and a bad colleague. ‘Don't let your emotions interfere’, was what her mother taught her. As the quote above the judges says, ‘Reason is the soul of all law’, the craft of law is not practised with emotion, but with reason. At that same job interview, the interviewer advises her to use that anger and frustration of rejection.

This contradiction between ratio and emotion is one that both Mel and RBG struggle with. In a heated discussion between the two of them, Mel instructs her, ‘Get your emotions in check!’ ‘You first’, RBG replies, because Mel also raised his voice. This presents the viewer with concrete evidence of the cliché that women are supposedly more emotional as lawyers than men. The viewer learns that for male lawyers too it is a constant challenge to find the balance between emotion and reason. In her final speech in court, RBG bumps into the microphone in an expression of anger and frustration, after which she embarrassedly touches her forehead with

⁴¹ With ‘Denver’ he refers to the *Moritz v. Commissioner* hearsay.

her hand and gets disapproving looks from Mel. She then recovers in the rebuttal, where she calmly reasons why the law is morally unjust. In this way, she finds a way to balance emotion and reason: driven by her emotion, she manages to shape her arguments rationally and gains conviction in court.

We cannot know what Mel and RBG are thinking when they read that ‘Reason is the soul of all law’, but the fact that the sentence is so prominently shown is symbolic for the many different forms of ‘reason’ that are invoked throughout the film. It calls on the viewer to make up their own minds about what exactly this concept means.

4. Women in film: hesitation in court

The fact that she manages to unite her emotional and rational side in her final argument doesn’t only demonstrate RBG's abilities as a lawyer at the start of her career, but also alludes to the end of a representation of women in courtroom dramas as incompetent sentimental beings.

Since 1929, when a woman made her first appearance in the American courtroom film genre, there has been frequent and critical writing about the negative portrayal of women in film.⁴² The introduction of the fictional female lawyer served as a warning to women who would dare to take on the profession of a man.⁴³ After all, this would lead to domestic discontent or women disregarding their sacred calling to bear children.⁴⁴ Traditionally, women in the

⁴² SHEFFIELD 1993, 73.

⁴³ *Ibidem*, 75.

⁴⁴ *Ibidem*, 76.

role of lawyers are portrayed as emotional, young and naive, pursuing high ideals of justice⁴⁵ or lacking common sense.⁴⁶ *On the basis of sex* is a clear attempt to break with these clichés.⁴⁷ The statements of Mel, who is very sharp when RBG shows herself being emotional, still fit this stereotype of the overemotional female lawyer. Although RBG manages to balance ratio and emotion in the end, one can wonder why the filmmaker chose to have RBG stumble over her words at first and, not being quite in control of herself. After all, the real RBG indicates that this never happened.⁴⁸

In a review by the New York Times, this stumbling is blamed on the classic biopic cliché.⁴⁹ Within that genre, women are generally chosen less as subjects for a film, because their biography would be based on private events rather than public ones. In this sense, *On the Basis of Sex* is interesting because RBG's private life plays a very important role in the story. Besides law, family values are very important both in the film and in RBG's life. Thus, Bozarth's argument that the traditional values of the nuclear family would be compromised if women wanted to make a career also reflects the visualisation of the female lawyer in the classic courtroom film.

Although this private aspect is cited as being reason not to make a biopic about a woman, the intimate look RBG's private life creates the opportunity to break with previous clichés about the role of women in the biopic and courtroom film genre. Martin Ginsburg fulfils a role as a caring father who cooks and looks after the

⁴⁵ *Ibidem*, 77.

⁴⁶ CORCOS 2003, 1239.

⁴⁷ FARMER 2019.

⁴⁸ BRYANT 2018 (see note 8).

⁴⁹ SCOTT 2018 (see note 4).

children. It is he who puts his arm comfortably around his daughter's shoulders when she cries and at the same time manages to build a career as a prominent lawyer. At the same time, he encourages his wife in her legal career ambitions. She, in turn, takes care of all the household chores and also his university assignments while he is being treated for cancer. The relationship in the family is one of equality and respect, which contrasts sharply with the relationships between husband and wife outside the family.

Whether the fictional interpretation of RBG's hesitation in pleading is due to the clichés from the courtroom film or the expectations from the biopic is a question mark here. Either way, in this biographical courtroom drama, both the woman and the family remain intact. Indeed, in the final shots of the film, the viewer sees from a bird's eye view how Martin, RBG and their daughter Jane descend the courthouse steps embracing each other while they walk out of view. The core values of the family are retained, RBG can be a woman and a lawyer, the woman can deal with the law, not just with the kitchen sink.

5. RBG as the victor?

That the film gives the feeling that legal gender equality has been achieved is somewhat unavoidable, given that the scriptwriter deliberately chose to depict only one case from RBG's life and wanted to end the film on a positive note. *On the basis of sex*, however, makes you want to read more about the RBG and the feminist history of American law.

On an individual level of RBG's life story and the *Moritz* case in particular, the film can be viewed as an exposition of the legal

brief, where RBG's reasoning of the *Moritz* case is laid out. Her arguments are translated into images, so that the viewer seems to experience the legal reasoning in a visual way. This was also Stiepelman's intention when he wrote the script. After all, his aunt explicitly emphasised: 'On TV it all comes down to the oral arguments. But the brief is crucial. The brief matters'.

Legal proceedings and film have in common that both are visual representations of abstract ideas.⁵⁰ On the one hand, law provides a rewarding subject for the medium of film, because the environment of the courthouse, the inscription and painting on the walls and the particular roles of the parties provide a visual legitimisation of justice.⁵¹ On the other hand, film is able to visualise the legal arguments and in this way reinforce them. *On the basis of sex* exploits these possibilities well, giving the viewer a feeling that they understand the law and reasoning of that time and the feeling of (un)justice that RBG felt. It is a clear representation of the beginning of RBG's career and her motivation to keep fighting for gender equality.

On a more broad level, RBG is only part of a larger whole, in which a lawyer like Dorothy Kenyon has already laid the foundations on which she builds.⁵² The whole film, and thus the letter, is built on the constant intertwining of law and society. It formulates a rule of law that RBG herself proposes: society changes even without law. She only asks that judges recognise this 'Right of a nation to change'. This is what Mel means when he looks up from the maxim 'Reason is the soul of all law.' and says, 'well, here we are'; it depends on the

⁵⁰ ALMOG & AHARONSON 2004, 5-6.

⁵¹ *Ibidem*, 7.

⁵² BARBAS 2009, 425.

Moritz case whether the time is actually ripe for an evolution in the law.

In this sense, the film also formulates an ontological question: how much agency does RBG possess herself, and how much depended on the timing of the precise moment? By focusing on the 'climate of the era' and 'the weather of the day', the film exhibits many deterministic elements that allow one to question RBG's own individual freedom of choice. At the same time however, it is RBG who convinces Moritz to take up the case and who confirms to him that he is right. In this way, RBG herself shapes the ideas of the new generation.

As a teacher, she also has an influence on that next generation, but as she says, her arguments do not fit into the concept of "radical social change". RBG herself needed a change in society to become a lawyer, she needed her daughter to see that it was time for her to take up arms and go to court. As the billboard with the scantily clothed woman in the background shows her and her daughter walking through the streets of New York, her daughter will face other challenges regarding gender discrimination.

RBG's true achievement seems to be that she did not give in to the norms of the time, she continued to believe in her understanding of what justice is and kept her eyes open for what would be the right moment to convince the law of this. This seems to be the interpretation of 'reason' that both Stiepleman and Leder want to give throughout the film. It is up to the viewer to decide whether they agree with this, but it is certain that many interpretations are possible.

In any case, the citation that RBG gives in her biography seems appropriate here: 'As society sees what women can do, as

women see what women can do, there will be more women out there doing things, and we'll all be better off for it.’⁵³

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⁵³ GINSBURG 2016.

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