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# A Forgotten Kelsenian? The Story of Helen Silving-Ryu (1906–1993)

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## Abstract

*This article seeks to create a historical contextualization of the first female law professor in America, Helen Silving-Ryu (1906–1993). Relying on Pierre Bourdieu’s work on the social and historical determinants of cultural production, this article situates Silving in her days at the University of Vienna as one of the first six female students to be admitted and as the only female scholar to be mentored by Hans Kelsen (1881–1973). Much of this article deals with Kelsen’s importance to Silving’s intellectual development, particularly because they worked together again in Harvard after both escaped National Socialism. Despite Silving’s later academic contributions and successes, her history has received little attention from the legal discipline by and large. Apart from recovering Silving’s voice, through what she calls ‘Acts of Providence’, this article also shows why, and more importantly how, Silving – and thus also a part of Kelsen’s history – has been forgotten.*

Very much has been, and still is, written about the legal contributions by the Jewish Viennese scholar Hans Kelsen (1881–1973). His *Pure Theory of Law* as well as his drafts of the Austrian Constitution, for which he devised the first modern European model for constitutional review, crowned him ‘the jurist of the 20th century’.<sup>1</sup> For the sake of a better understanding of Kelsen’s work, as well as its continued allure, contemporary scholars attempt to situate his work within the larger context of his

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<sup>1</sup> See H. Dreier, ‘Hans Kelsen (1881–1973): “Jurist des Jahrhunderts?”’, in H. Heinrichs, H.H. Franzki, K. Schmalz, et al. (eds), *Deutsche Juristen jüdischer Herkunft* (1993), at 705.

historical, social, material and geographical conditions.<sup>2</sup> It is clear that these historical endeavours and reconstructions are part and parcel of the recent turn to historical analysis in international law which aims to contextualize the profession in relation to other legal traditions and/or politics.<sup>3</sup> Apart from these scholarly efforts, much attention has also been given to other academics who have further developed Kelsen's work and tradition.<sup>4</sup> It suffices here to mention that being considered a 'Kelsenian' is still meaningful, even if its implications are confusing and change over time.<sup>5</sup>

This article focuses less on Kelsen and more on his environment: how he, as an iconic figure, was engraved within the history of international law. I reflect on these developments by focusing on Kelsen's female protégé, Helen Silving-Ryu, a Jewish Orthodox woman born in the Galician part of the Austro-Hungarian Empire in 1906.<sup>6</sup> Against almost all odds Silving is remembered as the 'The First Lady of American Law'.<sup>7</sup> Her long and eventful odyssey, culminating in a law professorship in Puerto Rico, included a constant internal struggle with Orthodox Judaism; degrees in both political science and law from the University of Vienna; an American law degree and admission to the Bar in New York; working as a lawyer in Wall Street, and then for the office of the Alien Property Custodian in the Justice Department; years of teaching criminal law in both Puerto Rico and South Korea, and dedication to the development of the legal systems and legal education of these two countries.

Silving believed that her life and work were made possible by 'Acts of Providence'. It was an act of providence that brought her to study with Hans Kelsen in Vienna; another act of providence that saved her from the fate of European Jewry and took her to the United States where she commenced her work with Kelsen. And it was a providential act that intervened again, guiding her to marry the South Korean law professor – and later the President of the Seoul National University – Paul K. Ryu (1915–1998), whom she met in Harvard in 1954 and collaborated with intellectually from that time on.

What is fascinating about Silving's story is that, except for the more recent work of Marion Röwekamp,<sup>8</sup> and Silving's own attempts to receive scholarly recognition, she

<sup>2</sup> See, for instance, the special edition the *EJIL* has dedicated to different papers on Hans Kelsen: 'The European Tradition in International Law: Hans Kelsen'. 9 *EJIL* (1998), available at: [www.ejil.org/issue.php?issue=48](http://www.ejil.org/issue.php?issue=48). See R. Walter, C. Jabloner, and K. Zeleny, *Der Kreis um Hans Kelsen* (2008).

<sup>3</sup> The turn to history in international law is by now a 'trend' that is hard to ignore. See, for instance, Kemmerer, 'The Turning Aside. On International Law and Its History', in R. Bratspies and M. Russell (eds), *Progress in International Law* (2008), at 71–94; and Craven, 'Introduction: International Law and Its Histories', in M. Craven et al. (eds.), *Time, History and International Law* (2007), at 1–27.

<sup>4</sup> R.Y. Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (2012), at 237, 250, 287, 306 and 322.

<sup>5</sup> For one understanding of what a Kelsenian perspective might be see, for instance, J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2010). Likewise, for a more specific definition of what the focus of a Kelsenian jurist might be see N. E. Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (1984), at 83–88.

<sup>6</sup> Please note that for reasons explained below, I use Helen Silving-Ryu's name in its shortened version, i.e., Silving.

<sup>7</sup> See M. Röwekamp, *Juristinnen. Lexikon zu Leben und Werk* (2005); and Röwekamp, 'Helen Silving', in R. Walter, C. Jabloner, and K. Zeleny (eds), *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre* (2008), at 487.

<sup>8</sup> See more in Röwekamp, *Juristinnen. Lexikon zu Leben und Werk* and Röwekamp, 'Helen Silving', both *supra* note 7.

has received very little attention both from contemporary Kelsenians and/or international legal historians more generally. It is almost impossible to give full appreciation to Silving's biography in the present context, also because her autobiography is impressively complete.<sup>9</sup> Thus, the intention here is to show why, but more importantly how, she – as well as a part of Kelsen's history – has been forgotten.

There are several basic assumptions that underline my approach: my first assumption is that the reality of the international legal discipline (i.e., its knowledge) is socially constructed. In general, the lens through which I study these dynamics is that of the sociology of knowledge (*Wissenssoziologie*), which infers that theories and ideas have homes and histories.<sup>10</sup> Otherwise stated, theories and ideas are not static, nor do they depend on scholarly efforts only: how such theories are echoed and/or recorded in the discipline's historical pantheon is of similar importance.

Secondly, my approach conceives the dialectics between such scholarly contributions and the subject of international law to be of significance because international law is a particular discourse about global *consciousness*, *intuition*, and/or *mentality*.<sup>11</sup> Here I follow Duncan Kennedy and consider international law as a profession to have always been a *project* carried out by international lawyers and their universal *consciousness*. Such consciousness, according to Kennedy, is 'understood as a vocabulary, of concepts and typical arguments, as a *langue*, or language, and to the specific, positively enacted rules of the various countries to which the *langue* globalized as *parole* or speech'.<sup>12</sup> This discourse, or rather the struggle over the institutional or conceptual possibilities of the law, is determined by the drives and characteristics of the legal actors involved.<sup>13</sup>

In brief this means that without international lawyers, and their vision of the universal consciousness, there is no international law. I would stretch this a little further and say that although our identity as individuals has consequences for what we do

<sup>9</sup> Silving's *Memoirs* is full of honest detail that describes her life experiences, research directions, and is very revealing in terms of self-adoration and painful psychological self-reflection: see H. Silving-Ryu, *Helen Silving: Memoirs*, with the cooperation of Paul K. Ryu (1988).

<sup>10</sup> 'The collective character of scientific work determines not only the elaboration of new ideas but also their genesis ... a new idea, a new thought, can never be traced back to a particular individual ... rather from collective cooperation whose medium is communication of thought': R.S. Cohen and T. Schnelle (eds), *Cognition and Fact: Materials on Ludwik Fleck* (1986), at xi. Note that I use terms such as *Wissenssoziologie* and sociology of knowledge interchangeably. (For more on the differences between these terms and other terms such as 'intellectual history' and/or *Ideengeschichte* see Kelly, 'What is Happening to the History of Ideas?', *J History of Ideas* (1996) (reprint) 36, at 50.)

<sup>11</sup> See Kennedy, 'Two Globalizations of Law & Legal Thought: 1850–1968', 36 *Suffolk UL Rev* (2003) 631, at 657–667. The notion of global sensibility goes back, in different forms and shapes, to the first article of the statute of the *Institut de Droit International*; the first professional association of international lawyers that was established in Ghent, Belgium, in 1873. It was there that 11 European men defined themselves as 'the juridical conscience of the civilized world': Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *EJIL* (2005) 113.

<sup>12</sup> Kennedy, 'Three Globalisations of Law and Legal Thought: 1850–2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (2006), at 23.

<sup>13</sup> Duncan Kennedy defines these professionals as 'actors with privileged access to the legal apparatus – lawyers for economic actors, lawyers working as legislators, judges and legal academics – have a professionally legitimated role to play, a role that parallels and overlaps that of economic power holders': *ibid.*, at 20.

and is personified in everything we do the question of identity seems to be of particular importance in international law because the international legal discourse itself is not always clear about its own identity: Is it law or politics? Here I draw on Martti Koskenniemi's description of the legal profession as an insoluble 'ascending/descending' liberal dyad structured between theory and practice, concreteness and normativity, law and politics, apology and utopia, public and private, and so on.<sup>14</sup>

Situating Silving within this framework gives one the possibility of examining how and why certain choices, problems and solutions were available – and/or unavailable – to the legal profession in a specific historical period.<sup>15</sup> Moreover, the focus on Silving, a female protagonist, is bound to highlight the slow and painful integration of women into the discipline of international law, as well as to reflect the troubles and limitations of the profession as a whole. Thus, while this article reflects a specific European legal approach to international law, it does so from a fresh paradigm (i.e., 20th century German-speaking Jewish woman lawyer/émigré).

If it is accepted that international law is a particular Western, European, Christian, masculine and white global consciousness,<sup>16</sup> then probing into the relationship between international law and its religious, cultural, gender, and social backgrounds may be a kaleidoscopic way to find out how these dialectics work. Whereas the essential question is how international lawyers turn subjective meanings of the law into objective facticities within the field, in this case I ask further: Did Silving, because of her gender, bring into the predominantly masculine global consciousness a 'contradictory consciousness' which in her case intersected with her Jewish minority culture?<sup>17</sup>

## 1 Silving's Early Childhood: Embodying the Paradox of Jewish Women

Born as Henda Silberpfennig, Silving was the second of three children born into a Jewish Orthodox and bourgeois Galician family. She inherited her name (Henda) from her great grandmother, who was the first female banker in then Austro-Hungarian Krakow. Her father Szaje acted as the head of the Jewish community in then Austrian-Hungarian Tarnow before being murdered by the Nazi death machinery.<sup>18</sup>

<sup>14</sup> As Martti Koskenniemi phrases this, 'Doctrine is forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice versa*, without ever being able to establish itself permanently in either position. ... [Ultimately this is] explained by the *contradictory nature of the liberal doctrine of politics*': M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (2005), at 46–47.

<sup>15</sup> China Miéville phrases the need to question the 'inhering' international legal ideologies with a *why*: '[o]ne is left no sense of *why* this "idea" of international law should have arisen at a certain time and political-economic context': C. Miéville, *Between Equal Rights: a Marxist Theory of International Law* (2005), at 81.

<sup>16</sup> See more in M. Koskenniemi, *The Gentle Civilizer of Nations* (2001).

<sup>17</sup> Antonio Gramsci's notion of 'contradictory consciousness' should be examined instead of women's ability to create 'counter hegemony' to the masculine approach in legal professions: see Grossberg, 'Institutionalizing Masculinity: The Law as a Masculine Profession', in M.C. Carnes and C. Griffen (eds), *Meaning for Manhood. Constructions of Masculinity in Victorian America* (1990), at 133, 136–137.

<sup>18</sup> It seems that Silving's father never managed to match the financial expectations of Hendl, his maternal grandmother, who had taken care of him since his mother's early death. See more in Silving, *supra* note 9, at 22–23.

Silving's craving for learning was inherited from her mother – Salomea Bauminger – a passionate pianist who was the most learned woman in Helen's life.<sup>19</sup> The Silverpfennings travelled a great deal, which is why Helen attended grammar school in Baden (Austria) where she learnt German, adding to the Polish, Hebrew and French languages she already spoke and read. Helen completed her *Matura* with marks that 'have never before or thereafter been awarded to anyone'.<sup>20</sup> Although her private Gymnasium was non-denominational it was known as the 'little Thora School', for most of the girls who attended it were Jewish.

During this time, Silving and her two siblings, her older brother Henry and younger sister Ida (later the famous psychiatrist/physiologist known as Judith S. Kestenberg), received an equally important Jewish education from a private teacher who lived in their household. In her *Memoirs* Helen confesses to being both emotionally and rationally affected by their teacher who presented the Bible to her in a unique way: as 'a secular phenomenon rather than an object of worship'.<sup>21</sup>

For Jewish Orthodox women it was expected that they would do the mundane work both within and without the household, while Jewish men, fathers, brothers, husbands, and sons, continued in their spiritual role, bending over in study at the 'tent of the Torah'.<sup>22</sup> Hence, everything beyond the *Halakha*, in 'the outside world', remains subsidiary.<sup>23</sup> Given that most Orthodox families depended on women's financial support, it was accepted that they would study at the university in order to acquire better financial means. This, however, did not guarantee their equality to men. With the turn of the century this meant that while both Jewish men and women attended the university, men continued to be held in higher esteem within the Jewish communities.<sup>24</sup> In Silving's case – also because the family had the financial means to afford it – it was clear that she and her sister would continue their studies at the university. In fact, Helen and her younger sister, in contrast to their brother, had a much smoother socialization of knowledge and

<sup>19</sup> Salomea attended the Cracow University secretly before her marriage. This was hidden from her family who would not tolerate such profane behaviour from a respectable Jewish lady: *ibid.*, at 19, 27.

<sup>20</sup> *Matura* is the name of the final high-school exams that is used in Austria to date: *ibid.*, at 76.

<sup>21</sup> As she writes, 'to me, the Bible has rather become a medium of enlightenment, a source of aesthetic enjoyment, and an intrinsic phase of my personal history, a part of myself. It is thus part and parcel of my personal culture, of the way I am': *ibid.*, at 38. The impact of this strong affinity is recognizable in her legal writing later.

<sup>22</sup> As one of the first great Yiddish fiction writers, known by the pen name Mendele Moykher Sforim (Mendel, the bookseller), wrote, 'the wife worships the husband, and takes care of his worldly affairs, and the husband worships the lord and takes care of the affairs of the world to come': quoted in I. Parush, *Reading Jewish Women: Marginality and Modernization in Nineteenth-Century Eastern European Jewish Communities* (2004), at 38.

<sup>23</sup> Here it should be briefly noted that according to Jewish law – *Halakha* mainly as interpreted by Rabi Yosef Karo in *Shulhan Aruch* (1563/5) – the status of women is one of grave inequality: women are subordinate to men in their relationship to God, to the family, and to the community by and large. Hence, everything beyond the *Halakha*, in 'the outside world', remains subsidiary. For more on the gender roles in east European Jewish communities see Silving, *supra* note 9, especially at 38–56.

<sup>24</sup> As described by Silving in her *Memoir*: '[A]s there were no private boys' schools in Tarnow and the only public school required attendance on Shabbat, my parents refused to permit Henry to attend school and instead hired a host of tutors for him. Thus from the very beginning of his process of education he was isolated. ... Ambition, striving toward advancement, dreams of achievement, and competition had no meaning to him. ... My parents, and like many other Jewish parents, wanted their only son to be a doctor. This is in accordance with Jewish tradition, in which learning is more highly regarded than wealth ...': *ibid.*, at 19, 73. Silving's brother Henry never really managed to establish himself professionally either in Europe or later in America.

professional success because of their gender.<sup>25</sup> Ostensibly, the *a priori* social assumption that Jewish women need to be practical while Jewish men should be theoretical also influenced women's relative success in certain early 20th century professions – law included – especially if we compare Jewish women with non-Jewish women during this period.<sup>26</sup>

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In order to examine if and how Silving's early experiences prepared her well for life at the university, I use Pierre Bourdieu's analyses of the legal academic *field* with its generated specific *habitus* and *cultural capital*.<sup>27</sup>

Bourdieu's research is valuable because he paints a complex, multi-layered, and even blurry picture of the field of law, which is a complete world with its own 'legal culture', its own legal habitus, its own internal organization, and its own incomplete but settled autonomy. The world of law, furthermore, lives off and within the even more hybrid world of the social. All legal professionals, be they judges, lawyers, scholars, and so on simultaneously participate in the struggle and competition for control both in the social world and in the legal world.<sup>28</sup> Law as an inter-active and intra-active social field has extra significance because it has reproduction and continuation capability.

Generally speaking, what is useful in Bourdieu's work is his focus on 'social spaces' and personal relationships – where the *field* (*champ*) of law and *habitus* interact inter-dependently – rather than the vision of formal legal institutions.<sup>29</sup> More specifically, a field refers to a social space with its own rules and regulations. In each field 'a game takes place (*espace de jeu*'); with 'objective relations between individuals or institutions who are competing for the same stake'.<sup>30</sup> Likewise, each field generates its own specific

<sup>25</sup> For more on the important interaction between the acquiring of primary ('homebound') and secondary ('objective' education) levels of socialization of knowledge see P.L. Berger and T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1967), at 129–180.

<sup>26</sup> A quick look at German-speaking law faculties during the interwar era reflects this phenomenon, although the representation of Jewish male scholars at the law faculties was high. By 1930, while Jews comprised less than 1% of the entire German population (4% of Austria before WWII and 10% of the Galician population which was a part of the Habsburg Empire until the end of WWI) Jewish scholars (or rather scholars with a Jewish background) occupied approximately 16% of the legal academic positions in all German-speaking universities. Just as telling, Jewish lawyers (men and women) represented 25% of all private lawyers in Germany until the rise of the Social Nationalists. See more in Paz, *supra* note 4. The percentage of Jewish women in the field exceeds that of both Jewish men and non-Jewish women: '[i]n 1918/19, the first year that women were admitted to the law faculty in Austria, thirty-one Jewish women made up fifty-two percent of the women law students at the University of Vienna. Ten years later, one hundred and thirty-one Jewish women comprised sixteen percent of all women students enrolled in law faculties in Germany. Jewish women lawyers thus made up a large proportion of the first generation of German-speaking women lawyers': see Friedenreich and Rówekamp, 'Lawyers in Germany and Austria', in *Jewish Women's Archives: Jewish Women, a Comprehensive Encyclopedia*, available at: <http://jwa.org/encyclopedia/article/lawyers-in-germany-and-austria>.

<sup>27</sup> For Bourdieu's social theory I rely mainly on P. Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (1984); P. Bourdieu, *Masculine Domination* (2001); and Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', 38 *The Hastings L Rev* (1987) 805.

<sup>28</sup> For more on this see P. Bourdieu, *In Other Words: Essays toward a Reflective Sociology* (1990).

<sup>29</sup> This is also why Yves Dezalay and Bryant G. Garth chose to use Bourdieu's social analysis in their study on international commercial arbitration: See Y. Dezalay and B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of Transnational Legal Order* (1996), at 16–17.

<sup>30</sup> P. Bourdieu, *Questions de sociologie* (1984), at 197.

habitus which is ‘a system of dispositions adjusted to the game’.<sup>31</sup> For a field to work ‘there must be stakes, and people ready to play the game, equipped with the habitus which enables them to know and recognize the immanent laws of the game, the stakes and so on’.<sup>32</sup>

So for the field to exist it must have a habitus, an internalized behaviour, that is shared by the participants. Participants, *à la* Bourdieu, are active in generating the game’s unformulated nature. Moreover, for the field to be recognized it has to have participants who ‘tick’ according to a shared habitus, even if only tacitly so. Cultural capital stems from esteemed cultural goods produced and performed within cultural institutions such as universities, schools, etc. Even though there are certain important overlaps between social capital (arising from social networks/relationships and influences) and economic capital (ownership of money, stocks, and so on), cultural capital’s main significance is its production of social belief in the legitimacy of contemporary dominant power structures.<sup>33</sup>

Keeping in mind that for Bourdieu the education system is one of the main representatives of symbolic violence in modern democracies by and large,<sup>34</sup> the field of international law is of particular interest because of its different dialectics with other social fields: law is pivotal for both the construction of a specific social habitus and the *professionalization* of the field in practice. In other words, while it is to be expected that international legal scholars develop the theory of public international law at university, the importance of legal academics for the practice of international law is perhaps less acknowledged but remains similar.

Arguably, the International Law Commission (ILC), among other international legal instruments, exemplifies the domination of international legal academics, their habitus, and cultural capital in the *practice* of international law. The ILC is the official UN body responsible for the ‘promotion of the progressive development of international law and its codification’.<sup>35</sup> The Commission ought to comprise ‘persons of recognized competence in international law’.<sup>36</sup> Competence suggests academic proficiency: almost all members of the ILC are either public international law professors and/or lecturers; and/or holders of a doctorate in international law; and/or published authors in the field. Significantly, for over 50 years of the ILC’s existence, no women members were included. Even now women are gravely under-represented.<sup>37</sup>

<sup>31</sup> *Ibid.*, at 34.

<sup>32</sup> *Ibid.*, at 110.

<sup>33</sup> See P. Bourdieu, *Homo Academicus* (trans. P. Collier, 1988), and Bourdieu, ‘The Forms of Capital’, in J. G. Richardson Westport (ed.), *Handbook of Theory and Research for the Sociology of Education* (1986).

<sup>34</sup> Symbolic violence according to Bourdieu is ‘censored and euphemized violence’ that is unrecognizable yet acknowledged. While it stands in contrast to open/direct violence (i.e., economic/physical violence), it is still legitimate, which is exactly the reason for it to be unrecognizable as violence: P. Bourdieu, *La Distinction. Critique sociale du jugement* (1979), at 216–217.

<sup>35</sup> See UNGA Res. A-RES-174 (III)

<sup>36</sup> Art. 2(1) of the ILC’s Statute.

<sup>37</sup> For more on the practice of the ILC see Crawford, ‘Prospects for the Codification and Development of International Law by the United Nations: The Work of the International Law Commission’, in K. Takamaa and M. Koskenniemi (eds), *The Finnish Yearbook of International Law* (1998), at 9–16. For the records of the newly elected members of the ILC see ‘New Members Elected to International Law Commission’, posted 22 November 2011, in IJRC, *Progressive Development of Law, UN General Assembly, Universal System*, available at: <http://ihrlaw.org/2011/11/22/new-members-elected-to-international-law-commission/>.

As this example reflects, Bourdieu's insistence on examining power relationships through mundane and daily social interactions is invaluable. Whatever its other theoretical shortcomings,<sup>38</sup> his approach reveals a micro-theory that unpacks *how* the social power, in all its guises and masks (be it institutional, economic, social, religious, ethnic, and/or gender) is sustained and channelled from one 'space' to another.<sup>39</sup> As the ILC example emphasizes, women's biased participation in the field of international law, and its habitus/cultural production that starts at the university level and earlier, is connected to women's invisibility in other powerful spaces. Moreover, the few women who succeed, despite their handicapped position, serve as the embodied proof that the field has gender equality.<sup>40</sup> Here Herbert Marcuse's definition of the 'negative thinking' of Hegelian dialectic, which stresses the need for the 'absent' in modern societies, is informative. In Marcuse's words, '[t]he absent must be made present because the greater part of truth is in that which is absent'.<sup>41</sup> It is, in other words, the professional achievements of the few underprivileged women that permit the social actors of the field of international law to believe that the structure is egalitarian and meritocratic in a broad sense. Silving, who described much of her life through 'acts of providence', exemplifies this well.

## 2 Helen meets Hans: An 'Act of Providence' or 'Gendered Coincidence'?

According to Silving, it was due to an 'act of providence' that she ended up at the University of Vienna. After it was decided that her brother, Henry, should earn his *Doctor rerum politicarum* at the Department of Political Science at the University of Vienna,<sup>42</sup> it was also agreed that the three women of the Silverpfenning family should go to Vienna 'to protect him from the vicissitudes of the "big city", the lurking danger of "evil women"'.<sup>43</sup>

<sup>38</sup> As Toril Moi rightly points out, 'Bourdieu's *general* theories of the reproduction of cultural and social power are not per se radically new and original'. Marx, Foucault, the Frankfurt School and Gramsci's theory of hegemony are more stimulating and challenging: Moi, 'Appropriating Bourdieu: Feminist Theory and Pierre Bourdieu's Sociology of Culture', 22 *New Literary History* (1991) 1017, at 1019. Here one can give a number of examples: that his critique of the academic world is mainly based on the French examples; that his work on gender is undertheorized and has too little to say about women or gender; that his work focuses largely on issues of class instead, and so forth (for Bourdieu's shortcomings see *ibid.*, at 1020 and/or L. Adkins and B. Skeggs (eds), *Feminism after Bourdieu* (2004).

<sup>39</sup> Moi, *supra* note 38, at 1020.

<sup>40</sup> While as Bourdieu conceptualized it, the triumph of the 'miraculous exceptions' (*des miraculés*) legitimates the exclusion of many other women, he still leaves much to be desired: As Toril Moi rightly points out, Bourdieu, who himself was a *miraculé*, does not really explain where these *miraculés* come from: *ibid.*, at 1026, n. 14.

<sup>41</sup> Marcuse, 'A Note on Dialectic', in H. Marcuse, *Preface to Reason and Revolution: Hegel and the Rise of Social Theory* (1960), at x.

<sup>42</sup> As Silving recounts this, 'For my brother, considering his artistic leanings and rather pragmatic preferences, the faculty of political science was wholly inappropriate. But my parents decided that he was to study that field, and he accepted their decision, as he was used to letting them determine matters, thereafter sabotaging their successful implementation': Silving, *supra* note 9, at 74.

<sup>43</sup> *Ibid.*



Silving's mother, Salomea, yearning to escape the boredom of Tarnow, left with Henry a little earlier to enrol in the faculty. Upon his enrolment, she decided to become an audit student too: from then on Salomea considered herself a student and refused to ever be identified as a housewife.<sup>44</sup> Around this time Hans Kelsen, the law faculty's 'superstar', entered the family story: and it was Salomea who became a 'Kelsenian' first.<sup>45</sup>

A year later, Helen and her sister arrived in Vienna, and Helen enrolled in the political science faculty. She hoped to exercise a positive influence on her brother, which her mother – who was too busy with her own studies – had failed to do.<sup>46</sup> Significantly, Helen arrived right on time: only five days earlier women had been officially permitted to enter the political science faculty as well as the law faculty.<sup>47</sup> This 'act of providence', as Silving called it, or gendered coincidence common in the early 20th century, gave Silving the chance to become one of the first six female students in the political science faculty in 1924, and later in the law faculty.

Following her mother's lead, Helen attended Kelsen's lectures without fail. Silving describes their first encounter very poetically, if not romantically.<sup>48</sup> But rather self-reflectively she later admits that although '[e]nough remained of my "girlish" personality infatuated with a professor ... the focus gradually shifted to the future scholar, exploring the secrets of jurisprudence and political science in the light of contemporary culture'.<sup>49</sup> With time, their discussions became 'increasingly elaborate, and the sharp distinction between a professor and a student was gradually disappearing'.<sup>50</sup> This intimacy is reflected in Silving's decision to share only with Kelsen her orthodox observance of the Jewish law.<sup>51</sup>

<sup>44</sup> *Ibid.*

<sup>45</sup> As Silving describes it, 'My mother was absolutely enraptured with him [Hans Kelsen]. He was of the same age as she was and rather slight, but very agile and youthful, with regular features, penetrating dark eyes, and splendid white teeth, he was a fascinating and witty speaker. Mother attended his lectures regularly and came to class early enough to secure a seat in one of the front rows, to see and be seen. Of course, my mother's enthusiasm for Kelsen had a tremendous impact on me. As I view my own reaction today, I see it was her enthusiasm that first aroused my interest in political science': *ibid.*, at 75.

<sup>46</sup> *Ibid.*, at 75–76.

<sup>47</sup> Röwekamp, 'Helen Silving', *supra* note 7, at 487.

<sup>48</sup> Quoting her own description: '[o]ne evening, after Kelsen had to end his lecture earlier due to yet another riot between the Marxists and the National Socialists students of faculty, Silving met him at the faculty's exit: 'It was raining cats and dogs. So he invited me for coffee at the coffeehouse across the street. Amazingly, despite the carnage right on the opposite side of the street, we talked jurisprudence. At the time I did not experience this jurisprudential discussion conducted against the background of mass physical aggression as particularly odd. Jurisprudence had become part and parcel of my existence, as it was also closely associated with my image of Kelsen': Silving, *supra* note 9, at 86.

<sup>49</sup> *Ibid.*, at 89.

<sup>50</sup> *Ibid.*

<sup>51</sup> As she phrases it in her *Memoirs*, 'only Kelsen knew how deeply religious I was': *ibid.*, at 121. Silving kept the kosher dietary rules most of her life, and though she would study on the Shabbat she never used any means of transportation nor did she consciously violate other laws. Interestingly enough, Silving's insistence on practising Judaism is linked to her attempt to stay in touch with her upbringing as well as defiant to Kelsen. As she phrases it, 'I remember Kelsen gently sneering at my refusing to carry an umbrella on a Sabbath while I attended Vienna University. I was brought up in an Orthodox home ... Knowing that Kelsen looked upon such phenomena as primitive rituals, I struggled to maintain them and for this reason emphasized them as if in defiance of Kelsen': *ibid.*, at 275.

In any case, Kelsen, realizing Silving's potential, started supervising her 'evolving constructive theory of law'.<sup>52</sup> He suggested that she dedicate her dissertation to 'a comparison between his theory and that of the French legal philosopher Léon Duguit'.<sup>53</sup> Helen 'chose instead to focus on placing Kelsenianism within the framework of modern science and philosophy in general'.<sup>54</sup> In her dissertation, entitled *Idealistische und Realistische Staatslehre* (Idealistic and Realistic Political Science),<sup>55</sup> Silving developed an understanding of how *The Pure Theory of Law* can be of use to the practising lawyer.<sup>56</sup> Whereas the importance of Kelsen's theoretical approach remained at the basis of her international legal scholarship, Silving – as discussed in more detail below – did find her own voice and slowly built her own independent legal theory.

Arguably, Silving's earlier work 'only' explains Kelsen's theory. According to Marion Röwekamp, Silving's understanding of Kelsen's *Pure Theory of Law* can be divided into two phases: early 'internal' phase and a second later phase as 'external' critic.<sup>57</sup> Whereas in the former phase Silving was convinced that any critic could only come from within a general acceptance of Theory's basic approach, the latter phase shows more openness and a return to her earlier insistence on a broader understanding of the Pure Theory of Law's heuristic capabilities.<sup>58</sup> Although she remained truly convinced of the value of the Pure Theory of Law, in other important aspects she disagreed with Kelsen's 'meta' assumptions from the start (i.e., the complete separation between the *Sollen* and *Sein* and Kelsen's insistence on philosophical contingency).<sup>59</sup>

Almost from the beginning, she distanced herself from Kelsen's so-called radical positivism.<sup>60</sup> This she did by a certain but rather constant reliance on principles of natural law. To her, philosophical debates about 'positive' or 'natural' law are not sufficient to secure the promise of obedience. In fact, 'natural law and positive law not only raise conflicting claims to exclusive domination over the word "law", but they also,

<sup>52</sup> *Ibid.*, at 91–92.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> For more on Silving's relationship to Kelsen's Pure Theory of Law see Marion Röwekamp's research 'Helen Silving', *supra* note 7, at 491–496.

<sup>56</sup> Silving, *supra* note 9, at 91–92, 96.

<sup>57</sup> Röwekamp, 'Helen Silving', *supra* note 7, at 493–500.

<sup>58</sup> For instance, in 1964 Silving returns to her Viennese thesis in attempting to re-establish the significance of appreciating Kelsen's work as a method to law in general: Silving, 'The Lasting Value of Kelsenism', in E. Salo (ed.), *Law, State and International Legal Order* (1964), at 297.

<sup>59</sup> In a brief footnote Silving sets herself apart from Kelsen: '[w]hile I do not accept Professor Kelsen's essential postulate that only "positive law" should be described as "law" – a postulate that Kelsen admits to be arbitrary – I believe that his theory is the only one susceptible of delimiting the areas of "positive" and "natural" law and thus describing the nature of the conflict between the two laws: Silving, 'The Twilight Zone of Positive and Natural Law', 43 *California L Rev* (1955) 477, available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3325&context=californialawreview>, at 491, n. 26.

<sup>60</sup> Jestaedt, 'Fundamental Criticism of Labandian Positivism: Kelsen's Departure from the State as Subject Imbued with Will', in H. Kelsen and M. Jestaedt, *Werke: Veröffentlichte Schriften 1911. Bd. 2. Halbbd. 1, Volumes 1–2* (2007), at 40.

more or less consciously, invade each other's narrower domain'.<sup>61</sup> While the tension between positive and natural legal concepts remains abstract, in concrete cases either positive or natural law prevails or fails.<sup>62</sup>

Silving, however, sought to incorporate 'super legal'/'super constitutional law' through positive legal enactments. In fact any unsettled yet 'delegated natural law' is created through positive mechanisms. For example, decisions by constitutional courts have 'authority to declare legal rules unconstitutional'. The overthrowing of any provision from written constitutions was to Silving 'positive revolutionary law'.<sup>63</sup> Such an incorporative and synthesizing approach gave Silving the ability 'to kill three birds with one shot': first, it permitted a measure of necessary distance from Kelsen's methodology; secondly, it gave an opening for her religious natural, legal, and/or political pursuits so overwhelmingly present in her academic contributions as they developed; and thirdly, reconciling positive and natural law was beneficial for the extra legal protection it gave from clear and present fascist dangers.

Together with the growing awareness of the Jewish *Shoah*, Silving's pleas for more natural law increased: her somewhat patient and respectful voice – especially towards 'Professor Kelsen', as she continually referred to him in her writing – changed to a new urgent and emotional tone.<sup>64</sup> For instance, her earlier subtler phrases such as: 'positive law and natural law are co-existent' and/or the 'relativity of positive and natural law is both a logical necessity and a fact of experience',<sup>65</sup> later turned into an almost aggressive blatancy: '[t]he difference between these two notions is believed by many legal scholars to be absolute and fixed. The time is ripe for "purging" these symbols ... [And to] show that law is not "either positive or natural", but is "more or less positive" or "more or less natural"'.<sup>66</sup> The message in her almost agonistic writing is clear: there is no time to lose over philosophical debates, especially now that we know what (in)humanity is capable of. The world is a grey place where dichotomies are seen and respected but dealt with in a practical manner.

### 3 How the Distance from Kelsen Grew Slowly

When Kelsen invited Silving to join the *Wiener Schule*, Silving considered it a revolutionary act:

<sup>61</sup> From a philosophical perspective, however, both positive and natural law remain inter-dependent. 'As in philosophy generally, so in the philosophy of law, the human mind turned outward before it turned inward: attention was first centred on the inherent "nature" of natural law, its objective attributes or its innate "substance", and only later on a subjective factor, the possibility, method of procedure of its cognition': Silving, *supra* note 9, at 477.

<sup>62</sup> 'Where they prevail they become positive law and are thenceforth also acceptable to positivists. Where they are rejected of course, they continue to be a subject of argument.' And vice versa: *ibid.*, at 490.

<sup>63</sup> *Ibid.*, at 489.

<sup>64</sup> Silving's respectful prefaces to Kelsen are evident in both her academic works as well as in her *Memoirs*: see, for instance, Silving, 'In Re Eichmann: A Dilemma of Law and Morality', 55 *AJIL* (1961) 307, at 355 and/or Silving, *supra* note 9, at 263–264.

<sup>65</sup> Silving, *supra* note 9, at 488, 492, 495.

<sup>66</sup> Silving, *supra* note 9, at 308.

Kelsen invited me, a mere student, to attend this famed exclusive seminar. Membership in it was the most prestigious status to which even a holder of a doctoral degree might aspire. It was actually limited to professors, lecturers, and postdoctoral researchers working on publications.<sup>67</sup>

Evidently, Silving's sense of being different was only reinforced by Kelsen's invitation to participate in the *Schule* that dated back to the winter semester of 1914/1915. In fact it was only after achieving much fame at the University of Vienna and beyond that Kelsen established the exclusive *Wiener Schule*. Every Wednesday approximately 12 people – some of whom came from abroad – met at Kelsen's home for an Austrian-style *Jausengespräch* (snack/meal-talk) to discuss jurisprudential matters.<sup>68</sup> The *Zeitschrift für Öffentliches Recht* (*Journal of Public Law*) was the group's publishing organ, which spoke to larger German-speaking audiences in the field.<sup>69</sup> Very soon, the impact of Kelsenianism, the Pure Theory of Law and the development of legal positivism echoed loudly in German-speaking legal circles.<sup>70</sup> That it overlapped and interacted with *Die Wiener Kreise*, which also dealt with Vienna's political and social instabilities, clearly helped its fame.<sup>71</sup>

Despite her gender, Silving fitted into the respected *Wiener Schule* at least in terms of her socio-economic class.<sup>72</sup> This fits in perfectly with Bourdieu's analysis that shows how the education system favours the bourgeoisie even in its most intrinsically academic exercise.<sup>73</sup> Indeed not only did she become a member of the *Wiener Schule*, she was even asked to present her dissertation to its prestigious audience. This was the greatest day of her life: after long hours of preparation, the then 21-year-old Silving delivered her talk which was followed by an animated discussion.<sup>74</sup> Felix Kaufmann (1895–1949), the renowned Jewish Austrian and later American legal philosopher,

<sup>67</sup> Silving, *supra* note 9, at 90.

<sup>68</sup> The *Wiener Schule* included the likes of: Felix Kaufmann, Adolf Merkl, Erich Voeglin, Alf Ross, Fritz Schreier, Hugo Huppert, Rudolf Métall, Charles Eisenmann, and Alfred Verdross. See also A. Korb, *Kelsens Kritiker: Ein Beitrag zur Geschichte der Rechts- und Staatstheorie* (2010), at 74.

<sup>69</sup> The original title of the journal was *Österreichische Zeitschrift für öffentliches Recht*. The Austrian was dropped out of the title with the expectation of a union between the German Empire and Austria: see M. Stolleis, *A History of Public Law in Germany, 1914–1945* (2004), at 154.

<sup>70</sup> As Michael Stolleis argues, this *Schule* 'formed the greatest theoretical challenge to German state law theory and undoubtedly stimulated the anti-positivist current': *ibid.*, at 154–155.

<sup>71</sup> For more on Vienna's Circle see Timms, 'Die Wiener Kreise. Schöpferische Interaktionen in der Wiener Moderne', in J. Nautz and R. Vahrenkamp (eds), *Die Wiener Jahrhundert wende* (1996), at 128. Austria's social and political situation certainly loomed large in the background of both these movements. As Kelsen himself confessed, 'Considering the Austrian state which was made up of so many different racial, linguistic, religious and historical groups, theories that tried to found the unity of the state on some socio-biological context of the persons legally belonging to a state clearly proved to be fictions. To the extent that this theory of state is an important part of the Pure Theory of Law, the Pure Theory of Law can be seen as a specifically Austrian Theory': Kelsen, 'Autobiography', in M. Jestaedt (ed.), *Hans Kelsen Werke* (2007), at 59f.

<sup>72</sup> As she describes it, 'Tuition for Austrian citizens was nominal, but working towards a degree required a great deal of effort and much time. Most of the [communist] students within this group disliked me wholeheartedly, simply because I owned two fur coats and used makeup, which made me a "capitalist":' Silving, *supra* note 9, at 83.

<sup>73</sup> 'According to Bourdieu there is an almost perfect homology between the class position of the individual pupils and their teachers' intellectual judgments of them': see Moi, *supra* note 38, at 1024.

<sup>74</sup> For Silving's vivid description of the day see Silving, *supra* note 9, at 93.

‘intervened [in Silving’s presentation] more than he ever did’.<sup>75</sup> Suggestively, in her *Memoirs* Helen takes pride in hearing from Alfred Verdross (1890–1980), Kelsen’s oldest protégé, who could not attend her presentation, that the word going around was that ‘to Kelsen she [Silving] was like the sun’.<sup>76</sup> It remains impossible to know what Silving’s exact status in the *Wiener Schule* was. Were Kaufmann’s interventions well intended? Or were they instead intended to discredit? What about the shades and nuances around Verdross’s comment? Was being ‘Kelsen’s sun’ a praise? Or rather a pseudo innocent and possibly sexually imbued smear on both Silving and Kelsen? Although Silving read these in a positive light, her reaction could be a representation of internalizing benevolent sexism.<sup>77</sup>

The question of how she was included/excluded from the *Wiener Schule* ought to remain open, particularly because Kelsen’s authority transcended the German-speaking world also through his influence on younger generations of scholars even after he – and most of his students – were forced out of Vienna, Germany, and then Europe altogether.<sup>78</sup> Kelsen stayed in constant contact with most of his students.<sup>79</sup> Granted that most of his students became prominent figures of international law, international politics, and also international relations, the social network thus created stands to prove the importance of being included/excluded and/or forgotten from Kelsen’s networks.<sup>80</sup> And at the risk of being repetitive: despite all the work that is still dedicated to Kelsen and his disciples, Silving’s participation is almost forgotten.

Being ‘included’ in Kelsen’s circle and thus also in the history of the discipline does not necessarily mean something positive: as Martti Koskeniemi argues, such inclusion is problematic since it already embodies a Eurocentric assumption that being included in the system

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, at 93–94.

<sup>77</sup> As Peter Glick and Susan Fiske show, sexism needs to be viewed in its multidimensionality. Thus, unlike ‘hostile’ sexism that reflects a clear negative evaluation of women, ‘benevolent’ sexism adds extra shades of grey into the picture, namely sexism that is both positive and yet is unequal in its approach. See more in Glick and Fiske, ‘The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism’, 70(3) *J Personality and Social Psychology* (1996), at 491–512.

<sup>78</sup> To mention but a few famous links, Hans Kelsen remained in contact with Hersch Lauterpacht, his Jewish Polish student, who emigrated to London after finishing his first PhD in Vienna, Rudolph Metal’s contacts with Kelsen persisted throughout their lives. Likewise, Hans Morgenthau, Leo Gross, and John Herz studied under Kelsen’s supervision at the Graduate Institute in Geneva and remained in direct contact with him.

<sup>79</sup> For more on the Kelsen’s ‘Vienna Circle’ see Kunz, ‘The “Vienna School” and International Law’, in J.L. Kunz, *The Changing Law of Nations: Essays on International Law* (1968), at 59, and Jabloner, ‘Kelsen and his Circle: The Viennese Years’, 9 *EJIL* (1998) 2.

<sup>80</sup> The benefits of such unofficial associations are made clear if we consider the relationship between Hans Morgenthau and Hersch Lauterpacht – Kelsen’s students who were *not* even participants in the *Schule*. Kelsen guaranteed Morgenthau’s credentials for his post in Geneva, and Lauterpacht reviewed Morgenthau’s dissertation favourably in the *British Yrbk Int’l L* (1931). Moreover, there was a friendly correspondence between the three, and later on Morgenthau ‘paid his debt’ to Kelsen by facilitating the publication of the *Festschrift* for the celebration of his 70th birthday, and then by arranging a well paid lecture series for him at the University of Chicago. Morgenthau also dedicated his 1971 book *Truth and Power* to Kelsen (see more in Paz, *supra* note 4, at 195).

of international law and/or its history is good ‘(because international law is “good”) whereas exclusion needs to be condemned’.<sup>81</sup> Apart from the *Wiener Schule’s* clear Eurocentric tendencies, its social, economic, and of course gender homogeneity should raise questions about Silving’s desire to be ‘included’ in it. But, as Koskenniemi argues, ‘the key question is not whether somebody is included or excluded, but what “inclusion” and “exclusion” means’.<sup>82</sup>

In other words, questioning the meaning behind Silving’s exclusion from Kelsen’s history necessarily re-opens the issue of her gender. Given that the almost normative task of academic supervision by law professors is the subject of very little discussion, was the gender question really at the heart of Silving’s exclusion?<sup>83</sup> After all, the function of supervision and/or participation in (un)official intellectual cliques is less reflected and articulated because it is, as Bourdieu articulates, linked to the system’s part in the transmission and reproduction of power within the legal field and its respective spheres.<sup>84</sup> Such mentoring traditions are essential for the legitimation of the field and its habitus generally. Even if the price of the field’s internalized habitus is a certain level of active and/or passive censorship, this only accentuates the power of certain actors in the field also through symbolic violence.<sup>85</sup>

Keeping these implicit traditional practices in mind, could it be argued that Silving’s omission has grounds other than gender? Say, for instance, could it be that she did not rank as highly as her male colleagues? Or that she failed to make significant (cultural capital) contributions to the field? Basically, I think not, especially as her legal approach is so similar to that of another Kelsenian protégé, namely Hersch Zvi Lauterpacht (1897–1960), who became one of the leading jurists of the 20th century.

#### 4 From Legal Positivism to a ‘Rabbinical Approach’ to International Law<sup>86</sup>

According to Silving, the success of the legal process depends on ‘two stages: (1) differentiation of morality from law; (2) conscious incorporation of the former into the

<sup>81</sup> Koskenniemi, ‘Histories of International Law: Dealing with Eurocentricism’, in T. Duve (ed.), *Rechtsgeschichte: Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* (2011), at 152, 175.

<sup>82</sup> *Ibid.*

<sup>83</sup> It should be noted that some recent work is dedicated to the important task of supervision mainly in the English-speaking world. See, for instance, Shannon, ‘Research Degree Supervision: ‘More Mentor than Master’’, in A. Lee and B. Green (eds), *Postgraduate Studies, Postgraduate Pedagogy* (1995), at 31; S. Sullivan and J. Glanz, *Supervision That Improves Teaching and Learning: Strategies and Techniques* (2009); J. Wellington, *Making Supervision Work for You: A Student’s Guide* (2010); and C. Todd and C.L. Strom, *The Complete Systematic Supervisor: Context, Philosophy and Pragmatics* (2002).

<sup>84</sup> These gaps of formalities are, to use Bourdieuan language, indispensable in order to produce the belief and legitimacy in existing power structures: see Bourdieu, *Homo Academicus*, *supra* note 33.

<sup>85</sup> Because the legitimate right to participate is given to the people recognized by the field as powerful possessors, symbolic capital then becomes symbolic power and hence, by definition, includes symbolic violence: see P. Bourdieu, *Sociology in Question* (1993), at 90–93; and Moi, *supra* note 38, at 1022.

<sup>86</sup> I draw this title from another article I wrote dedicated to Hersch Lauterpacht’s ‘Rabbinical approach’ to international law: see Paz, ‘Making It Whole: Hersch Lauterpacht’s Rabbinical Approach to International Law’, 4 *Goettingen J Int’l L* (2012) 417, available at: <http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/280>.

latter.<sup>87</sup> And because law is a linguistic discipline, both natural and positive law penetrate, infuse, and interact with one another.<sup>88</sup> 'It is neither linguistically-logically nor sociologically possible totally to eliminate the impact of "natural law" upon "positive law".'<sup>89</sup> Settling possible conflicts and paradoxes depends on the balancing capabilities of 'the law interpreter' who 'must choose between varieties of meanings'.<sup>90</sup> Such interpretation is done through a process that links the moral values of the legal actor and the moral environment in which he/she acts.<sup>91</sup> Significantly, it is not only up to the legal interpreter but also to public opinion. The legal actor's interpretations operate together through positive and natural legal ingredients "'creatively", evolving more or less imperceptibly new rules and concepts, which often include moral precepts'.<sup>92</sup>

It is here that Silving's approach – which delegates much interpretative power to the legal actor – comes closest to that of Lauterpacht. Importantly, Silving and Lauterpacht shared much in terms of familial backgrounds as well as legal perspective. The particular manner in which they diverge from Kelsen's pure positivism, namely the way it relies on a certain 'rational', 'modern', and 'scientific' natural law, is striking.<sup>93</sup> Lauterpacht's scholarly contribution, which is reminiscent of the legal methodology found in rabbinical Judaism, chiefly because it pays much attention to the 'art' of international legal interpretations, is discussed elsewhere.<sup>94</sup> The clear similarities between the scholarly approaches of Silving and Lauterpacht cannot be ignored, although a proper comparison between the two scholars exceeds the scope of this article. Thus, in what follows several similarities are examined, particularly because this helps to clarify Silving's legal method.

As mentioned above, Silving's insistence on the integration of natural legal principles together with a certain 'Kelsenian twist' resembles Lauterpacht's approach.<sup>95</sup> However, unlike Lauterpacht, who gives primacy to the citizen on the one hand,<sup>96</sup>

<sup>87</sup> Silving, *supra* note 64, at 340.

<sup>88</sup> As she phrases it, "The impossibility of eliminating from law extraneous novel elements is implied in the fact that law is a linguistic discipline which operates by means of language interpretation. This is true not only of the so-called "written law", that is, statutes and treaties, but also of the mistakenly so-called "unwritten law," the administration of which requires "reading" of case reports and records of custom': *ibid.*

<sup>89</sup> *Ibid.*, at 346.

<sup>90</sup> *Ibid.*

<sup>91</sup> "The law itself may demand of him that in this process he apply moral standards. But even in the absence of such a prescription, he is most likely, whether consciously or unconsciously, to give consideration to the moral values of the community': *ibid.*

<sup>92</sup> *Ibid.*, at 351.

<sup>93</sup> Apart from their scholarly interests, Lauterpacht and Silving identified themselves mainly as Jewish; they both originated from middle-class *ostjüdische* backgrounds where the atmosphere was one of deep Jewish nationalism and love of classical literature. Both had orthodox parents, both were well versed in the Torah and were fluent in Yiddish, Hebrew, and German. See more in Paz, *supra* note 4.

<sup>94</sup> In brief, Rabbinical Judaism accentuates oral but then written exegetical techniques carried out by the sages. See more in Paz, *supra* note 86. For more on Hersch Lauterpacht's legal approach see Koskeniemi, 'Hersch Lauterpacht 1897–1960', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth-Century Britain* (2004), at 601.

<sup>95</sup> See more in Paz, *supra* note 86, at 430–434.

<sup>96</sup> "The ordinary citizen is no longer in the mood to look at the matter as an [international legal] object of doctrinal dispute': Lauterpacht, "The Reality of the Law of Nations", 2 *Collected Papers* (1947) 22, at 22.

and to the legal interpretation of the international practitioner on the other.<sup>97</sup> Silving more realistically emphasizes what Outi Korhonen terms the *situationality* of the legal practitioner.<sup>98</sup> Silving, in other words, underlines the limitations of the social context: the practitioner's powers are constrained both by public opinion and the political conditions.

Secondly, while both Silving and Lauterpacht limit positive international law by principles of natural law, Silving invoked the sentiment of *injustice* (as opposed to justice) as the necessary boundary of positive law. Only the perception of injustice within 'the conscience of a majority of average people' should act as the limits for positive international law.<sup>99</sup> More significantly, however, Silving delineates her ideal of 'minimum natural law' from international legal concepts known as 'general principles of law recognized by civilized nations' as specified by Article 38 (1) c of the Statute of the International Court of Justice. These belong to the category of 'rules', and hence differ from the 'minimum natural law that consists of the raw material of potential rules'.<sup>100</sup> This understanding differs from that of Lauterpacht, who draws from the 'general principles of law' a blank cheque and even a duty for the legal actor to rely on his/her 'natural built-in ethical ability' to solve any possible gaps in the law before they become *non liquets*.<sup>101</sup>

Lastly, like Lauterpacht, Silving relied on her knowledge of both civil and common law systems to argue for the integration of more legal analogies from national legal systems into international law. More bravely, however, she suggested assimilating laws from the Federal Republic of Germany, which was almost a taboo at the time, to say the least.<sup>102</sup> In short, one could argue that Silving's 'rabbinical approach' is more flexible, integrative, humble, and more realistic in nature.

Be it 'rabbinical' or then reconciliatory, Silving's legal postulations that include 'minimum natural law' reflect her fear of Fascism which, as she viewed

<sup>97</sup> The principles of interpretations the judges follow 'are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means': Lauterpacht, 'Restrictive Interpretations and the Principle of Effectiveness in the Interpretations of Treaties', 4 *Collected Papers* (1949) 410.

<sup>98</sup> Speaking of *Situationality* assumes that the social characteristics of the people involved in each instance determine its outcome, at least as much as historically socially based legal principles, rules, doctrines, interpretations, etc. '[T]he situation comprises the interplay between the social, biological, cultural, etc. constraints on the human freedom, the effort towards objective justice, and self expression, and the diverse potentials to manage the maximum amount of freedom from these constraints': O. Korhonen, *International Law Situated: An Analysis of the Lawyers Stance Towards Culture, History and Community* (2000), at 8.

<sup>99</sup> Silving, *supra* note 64, at 310.

<sup>100</sup> *Ibid.*

<sup>101</sup> See more in Paz, *supra* note 86.

<sup>102</sup> A wonderful example of this is Silving's attempt to integrate the 'doctrine of inexigibility' from the post WWII German Penal Code into international law, in order to make international law more complete and more functional. See more in P. Ryu and H. Silving-Ryu, 'Error Juris: A Comparative Study', 24 *U Chicago L Rev* (1957) 421. See also Silving, 'Comments on Reform of the Federal Criminal Laws – A Comparative Analysis', 34 *Revista del Colegio de Abogados de PR* (1973) 107.



it, was empowered by positivism.<sup>103</sup> Although linking extreme legal positivism to the National Socialist regime became a common ‘trend’ in Germany during the 1950s, it remains debatable.<sup>104</sup> As H.L.A. Hart’s work reflects,<sup>105</sup> such anti-positivistic constructions seem to be a ‘one size fits all’ accusation.<sup>106</sup> Silving countered the Hartian view that ‘National Socialist law, however immoral, was “law”’.<sup>107</sup> Drawing on Gustav Radbruch, she argues that Hart’s approach remains meaningless because it lacks the needed ‘frame of reference within which he uses the term “law”’.<sup>108</sup> Ergo, although the German legal context changed drastically, the values and morality of the people should have protected the general ‘sense of injustice’. Evidently, Silving invokes external values to protect the law, which is – unfortunately – too weak in the face of power politics.<sup>109</sup> Her realism stems from her insistence on limiting the law, or rather the powers of the legal interpreter, by the common view of ‘sense of injustice’ instead of ‘a sense of flagrant justice’.<sup>110</sup> Besides, even if the German people possessed the required sense of injustice, the fact that their actions were deemed illegal a few years earlier only underlines the importance of the legal context.

<sup>103</sup> After all, it was ‘[t]he ultra-positivistic jurisprudential atmosphere ... [that] prevailed in Germany when Hitler and his cohorts appeared on the scene’: Silving, *supra* note 64, at 342. Significantly, in 1955 she phrases it a little more moderately: ‘[i]n Germany for instance, as a result of a total reliance on positive law, which accompanied the National Socialists regime and the Nuremberg Trials, there is now emerging a revival of natural law’: Silving, *supra* note 59, at 487.

<sup>104</sup> Arguably, this trend commenced with the work by the social democrat and legal scholar Gustav Radbruch (1878–1949) whom Silving cites often and favourably. Radbruch was considered a positivist before WWII, wrote in 1946 that ‘National-Socialism contrived to impose itself on its followers, soldiers on the one hand, and jurists on the other hand, by dint of two principles: “orders are orders” and “a law is a law” ... It reflected the positivistic law doctrine which had held sway over German jurists virtually unquestioned for many decades. As Radbruch urged, “positivism should be overcome, since it had destroyed all possibilities of defence against the abuses perpetrated under the National Socialist legal order”: Gustav Radbruch quoted in Ott and Buob, ‘Did Legal Positivism Render German Jurists defenceless During the Third Reich?’, in F.C. DeCoste and B. Schwartz (eds), *The Holocaust’s Ghost: Writing on Art, Politics, Law and Education* (2005), at 153.

<sup>105</sup> In 1958, H.L.A. Hart made a strong counter-argument against such claims by Radbruch and others, insisting that the separateness of law and morality is not ‘superficial’ or ‘intellectually misleading’. Hart argues that the opposite is correct: if the law is separated from morality, then even if a law was validly constituted, it did not follow that one was obliged to obey it: see Hart, ‘Positivism and the Separation of Law and Morals’, 71 *Harvard L Rev* (1958) 593.

<sup>106</sup> And as H.L.A. Hart’s analysis shows, positivism may have at least five different alternatives. See more in Paz, *supra* note 4, at 314–316.

<sup>107</sup> Silving, *supra* note 64, at 343–344.

<sup>108</sup> In Silving’s words, ‘From the point of view of German law, as prevailing at the time when the pertinent laws were issued, they were “law” endowed with “oughtness”. But from the standpoint of present day law, as interpreted by the highest courts of the Federal Republic of Germany, they “were” not “law” and “ought not” to have been obeyed. The assumption that the normative quality of the law, its “oughtness” must be judged as if the time of enactment is entirely gratuitous. The only “positivist” basis for Hart’s assumption is the prevailing international law rule which gives “recognition” to any legal system that proves efficacious, and includes within such “recognition” acceptance of the “oughtness” of any enactment of the efficacious system. But this rule is by no means self evident. Nor has it been invariably applied in international law, particularly in the inter-temporal field’: *ibid.*, at 355.

<sup>109</sup> *Ibid.*, at 356.

<sup>110</sup> *Ibid.*

In brief, to Silving the trouble with international law goes back to its modern birth. Like other modern sciences, mainly natural sciences, it necessarily reflects the cold, objectified and matter-of-fact, ‘thinghood-bound’ approach.<sup>111</sup> The appeal is for international law to ‘abandon its predominant orientation towards concrete “things” and incorporate a broader notion of “morality” – morality in the sense of substantive value ethics of modern man, of humanistic ethics focused on man’s dignity as a comprehensive ideal, concerned with all of man’s human characteristics, his aspirations and his conflicts’.<sup>112</sup> In other words, positive, objective, and/or pure international law is missing the consciousness space for the irrational, emotional, subjective, moral, and hence also natural law. The need is therefore to unify objectivity with subjectivity; natural with positive law; law and politics, etc. This is also reflected in Silving’s writing style.

Indeed, what is most impressive about Silving’s work is her straightforwardness, her clear writing, but above all her personal style. Silving was extremely modern in legal content: the law must be contextualized, functional, and realistically in vogue with social developments. Her approach, moreover, integrated all possible fields, tools and techniques essential to strengthen her argument. In many ways, and especially in comparison to the very prominent male international lawyers of her time, she was hopelessly emotional. She integrated her reading of the Old Testament into almost everything she wrote and repeatedly emphasized the importance of the Mosaic Law, its linguistic symbolism, together with her thorough knowledge of the common and civil law systems.

One should not mistake Silving’s emotional style for irrationality. *Au contraire*. According to her line of thought – intended to complement that of Kelsen’s legal purity – legal normativity does not exclude the pursuit of justice through passionate, emotional, natural, and even biblically guided means for the simple reason that all these means seek rationality. Philosophical debates aside, the overarching purpose of the jurist is to ensure that justice is followed and injustice avoided. After all, and as Joseph H.H. Weiler phrases it:

The problem of the unjust world is not epistemic. It is performative ... When we act unjustly, when we tolerate injustice, it is mostly not because we are cognitively mistaken or unaware. It is because we either lack the commitment to, or personal virtues necessary for, following the normative imperative of which we are quite aware ... What justice demands is not in doubt. It is the courage to stand up for it, which is where we humans are weak.<sup>113</sup>

Despite the biblical imperative, ‘justice, justice you shall pursue’ (*Deut. 16:20*), so central to Jewish legal thinking, Silving’s 20th-century experiences did not leave her overly optimistic about humanity’s ability to stand up for justice. She therefore sought a limited goal: to avail humanity of the possibility to dodge grave injustices. But this practical objective sanctifies all means: positive norms as well as natural legal principles and perhaps even traditions and Mosaic Law. Ultimately such an all-embracing method might result in legal ambiguities. Yet, Silving knew well that any legal approach is not clear of ambiguities, not even Kelsen’s Pure Theory of Law.

<sup>111</sup> *Ibid.*, at 308–309.

<sup>112</sup> *Ibid.*

<sup>113</sup> Weiler, ‘Abraham, Jesus and the Western Culture of Justice’, in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest, Essays in Honor of B. Simma* (2011), at 1318, 1320.

The strength of Silving's alternative stems from first accepting the truth in legal ambiguities, and secondly sincerely believing that within these ambiguities lies rationality. In other words, Silving managed to overcome legal paradoxes (law versus politics, natural versus positive law, rationality versus tradition, etc.) by knowing that all aspects possess and share a cognitive ambition for rationality. Basically, legal paradoxes ought not to stand in contradiction to humanity's commitment to normative order.

Be that as it may, examining Silving's legal approach, also by comparison with that of Lauterpacht, unpacks Silving's inclusion/exclusion mentioned earlier. Clearly, if we shy away from her gender difference much historical truth is lost: not only might it lead to questioning Kelsen's supervision abilities and choices to begin with, it could instigate an unwanted chain reaction that might lead to questioning Kelsen's iconic status *vis-à-vis* the profession. It is indeed much easier to politely ignore Silving's existence, or to mention her story in a form of trivialized gossip (as Verdross' comment on Silving's presentation did too). Arguably, doing so is more beneficial: it creates the possibility of seeing her *miraculé* role on the one hand, while also reducing her, on the other hand, to her sexuality which ridicules her. This serves as the legitimation of Silving's exclusion as well as the further marginalization of other women in the field. Or, in Toril Moi's terms, 'to cast women as women is precisely to *produce* them as women'.<sup>114</sup>

Thus, while Silving's story shows the different 'stages' of becoming a part of the field by mastering its habitus,<sup>115</sup> her gender reflects more precisely the difficulties regarding personal relationships within the discipline. More specifically, it is her gender that mirrors the already difficult questions arising in academic circumstances, for instance, how professors choose their students, and/or vice versa, how students choose professors. How are topics of investigation chosen and to what extent can such decisions be (in)dependent? In addition, how formal and institutional can such professional relationships be? Significantly, while the influence of the *Doktorvater* was and still is ever so vital for students' success, by the same dialectical token the success of the *Doktorvater* also depends on her/his students, although hardly in a symmetrical fashion.

Clearly, Silving's story accentuates the profession's limitations, paradoxes and inconsistencies. Her gender highlights that 'social capital is above all a matter of personal relations':<sup>116</sup> academic relationships, just like any other relationship, have multifaceted intricacies and indefinite factors of hierarchy and power both within and outside academia. Because she was in a minority position, a double minority for that matter, Silving was made to pay the price of being rejected and forgotten from Kelsen's background.

<sup>114</sup> Moi, *supra* note 38, at 1036.

<sup>115</sup> Bourdieu sees the process of cultural capital that culminates in symbolic social magic – the successful passage into the chosen elite – to take its shape and form in three different stages: first the *embodied state* of knowledge, when the scholar internalizes knowledge during the time of her/his doctoral research programme; secondly, the *objectified state* (when the capital culture is manifested in an actual object, an article, book, etc.) and thirdly the *institutionalized state* (in which cultural status is recognized and legitimized by institutions, as a degree conferred, or a prestigious university position): see Bourdieu, *supra* note 33, at 243–248.

<sup>116</sup> Moi, *supra* note 38, at 1039.

Furthermore, because Silving was a good student she internalized the field's structure and habitus with all that it includes and excludes, and she never tired of struggling for inclusion and recognition. This was a constant and tiring battle, with some victories and some losses. Before Kelsen departed for Cologne, in 1929,<sup>117</sup> he encouraged Silving to publish her thesis as it was. Silving, however, felt it was still inadequate so she found 'no stamina to do so'.<sup>118</sup> Without Kelsen's guidance or any other academic support, Silving at the age of 23 'found it too difficult to be a hermit scholar'.<sup>119</sup> In fact, after Kelsen's departure Silving entered a lonely period without any intellectual inspiration, systematic guidance, or curriculum. Most of all, she hated her 'powerlessness vis-à-vis the professors'.<sup>120</sup>

By 1936, and without much support, she completed the two state exams that awarded her another doctorate from the faculty of law of the University of Vienna. Ideally this would have given her the chance to become a practising lawyer. She was, however, barred from doing so because of her nationality: she was a Polish citizen and not Austrian. Silving declined the idea of marriage, which for a woman would have allowed her to commence a legal career in Austria.<sup>121</sup> Almost at the last minute, in 1939, Silving left Europe. With only 10 dollars in her pocket, she arrived in New York and spent the next years in search of a position in the US.<sup>122</sup> It seems that Silving's commitment to her academic goals during the first years of her 'American odyssey' are reflected in her rebellious insistence on avoiding jobs that could not accommodate her skills and abilities, despite her poor financial condition.<sup>123</sup> She identified her trouble in finding a position in the US as: 'my inadequacy lay in the fact that I was Jewish, refugee, with an accent, and without the stamp of conventional American preparation'.<sup>124</sup>

## 5 The (Less) Importance of Being Kelsenian: The American Side of the Story

By another 'providential act' Kelsen reappeared in Silving's life, literally while she was strolling the streets of Boston. He automatically offered her a job as his assistant at the

<sup>117</sup> Kelsen's move preceded a defamation campaign taken against him by the Catholic conservatives over constitutional matters. For more see Paz, *supra* note 4.

<sup>118</sup> Silving, *supra* note 9, at 96.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, at 96–99.

<sup>121</sup> *Ibid.*, at 103.

<sup>122</sup> Silving used the visa to the USA that she had acquired a few years earlier. It was not only the occupation of Austria by the National Socialists that got her to flee. Rather it was a failed love affair with the chief rabbi of the Polish army that helped her make up her mind to leave at the very last minute. (Her fiancé, rabbi Broniek, was 'made' to break up the engagement with Silving because his father, an orthodox rabbi, was not sure of how religious she was or, as she phrased it, it was her 'worldliness' that his father disapproved of.) See more on this episode in Silving, *supra* note 9, at 109–116.

<sup>123</sup> For more on this see *ibid.*, at 233–262.

<sup>124</sup> *Ibid.*, at 249. Elsewhere Silving explains her trouble getting Jews to help her too because she 'was a Polish-Jewish refugee from Germany. So that people who might promote me were Jewish-Americans with a strong Jewish self-identification, preferably those who had roots in the place of my origin. But I did not project the image of a distinctively Jewish or Polish-Jewish individual: I was a European intellectual with a profound Jewish interest at heart and an allegiance to Judaism that led secondarily to a Jewish self-identification': see *ibid.*, at 241.

faculty of social science of Harvard University, which she accepted just as spontaneously. To say that Kelsen, her Viennese *Doktorvater* and superstar, had trouble getting a job and/or receiving recognition in the US is an understatement. As David Kennedy puts it, ‘Kelsen has come to be treated as a leftover European philosophizer who could never quite get with the program in the United States after the war, and is remembered as much for his tin ear towards specific international legal issues as for his old worldly philosophical argument’.<sup>125</sup> While Silving recognized Kelsen’s misfortunes, she was also quick to defend, protect, and help him to the best of her abilities.<sup>126</sup>

Sitting opposite his desk, she took her role as his general assistant with the utmost seriousness.<sup>127</sup> Regardless of this affinity and dedication, Kelsen’s biographer, a former student and follower, Rudolf Aladár Métall, never mentions Silving in Kelsen’s biography. In vain, Silving confronted Métall personally on this point, demanding recognition. As she recounts in her *Memoirs*, she was told by Métall that ‘within the German terminology, being a professor’s *Assistent* is a formal university appointment’. Given that Silving did not hold such a position, ‘only Métall himself and Hulla had been Kelsen’s *Assistenten* in a technical legal sense’.<sup>128</sup> Needless to say, Lauterpacht was never Kelsen’s *Assistent* and yet he was recognized as Kelsen’s student without question.

In any case, meeting Kelsen again energized Silving to be ever more productive. Rather symbolically he even helped her select a new ‘American’ name as her students could not pronounce her long German name. The less ‘burdensome’ name was an abbreviated family name and a neutral first name.<sup>129</sup> This underlines Kelsen’s role, *inter alia*, as Silving’s substitute father figure, which is recognized by Silving herself in

<sup>125</sup> Fearing that Switzerland’s joining World War II was only a matter of time, Kelsen, now aged 60, was determined to leave for the US in 1940. This move was neither easy nor smooth, even after he became an American citizen. Eventually he became a full professor, with the help of Roscoe Pound, at Berkeley in 1945. Although at Berkeley Kelsen elaborated the field of international law very illustriously, yet he was never accepted as an ‘insider’ in the US: see Kennedy, ‘The International Style in Postwar Law and Policy’, 1 *Utah L Rev* (1994) 7.

<sup>126</sup> In her own words, ‘Kelsen himself was not successful in the United States: he never taught law as a full professor in this country. Those who denied him such position had a ready rationalization at hand: he had no common law background ... But is indoctrination in the common law method really necessary for all law school professors in the United States? ... The fact that law schools in this country found no appropriate position for Kelsen sheds doubt on the ability of these schools to develop a curriculum that would raise them above the status of glorified trade schools. There is a certain stereotype in professional careers in the field of law in this country; Kelsen did not fit into any stereotype. He was unique’: Silving, *supra* note 9, at 264.

<sup>127</sup> In Silving’s own description, ‘I read his manuscripts, looked up sources, and transcribed his newest lectures; when an improvement occurred to me, I drew it to his attention, discussed it with him and often – not always – prevailed. Kelsen would at first reject my criticism, but after a day or two, he would renew the discussion and change his manuscript to make it conform to my view. He would then say, “that was a splendid idea of yours, excellent indeed.” However I did have the feeling that he to be sure never expressly, that I did not always reciprocate his moving loyalty to me. (Of course the disloyalty I am mentioning consisted in a deviation from Kelsen’s theory of law, not a personal disaffection.) ... When Kelsen taught international law at Wellesley, I read and marked his students’ examinations papers’: *ibid.*, at 263. Kelsen even delegated some of his students for Silving’s supervision.

<sup>128</sup> *Ibid.*, at 264.

<sup>129</sup> *Ibid.*, at 278.

her honest and self-reflective confession that ‘I like to believe that my love for him was in a certain way a reaction to his *choice* of me’.<sup>130</sup>

Although Silving criticized Kelsen’s work, she never doubted his significance for her and/or to legal theory in general. Nor did she ever stop being loyal to him or fail to appreciate his opinion over and above all others. This partially explains her determination for her work to be quoted by him.<sup>131</sup> ‘Writing incessantly, furiously, obsessively’, only to receive Kelsen’s public recognition was the price she willingly paid for being *chosen* by Kelsen. But it was more than this: Silving strived for Kelsen’s official acknowledgment because she feared she might be excluded further from the discipline by her male competitors – given that she too internalized the habitus of the legal field, she knew how significant it was to be quoted by him, perhaps because Kelsen was not too keen on quoting other scholars in general.<sup>132</sup>

However that may be, we ought to wonder whether the renewed interest in Kelsen is not also a reaction to the historical anxiety Kelsen’s dominant scholarship induced, which after attempts at self-appropriation was then suppressed and perhaps still needs to be overcome within the discipline of international law.<sup>133</sup> Thus, Silving’s exclusion could also be a constant reaction to representing a gender difference as well as a Kelsenian approach. This makes perfect sense if we accept Bourdieu’s evaluation of the competitive nature of the field and its stakes. Clearly, Silving, like other women of her time, might have become a woman who was *impossible to ignore* by and in the field.<sup>134</sup> Silving’s relationship to Kelsen, however, illustrates the important role of the education system for the reproduction of power and how it manufactures symbolic but also real violence/censorship. These incidents show how in times of social crisis these structures can become treacherous, particularly because of their unarticulated form.

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Silving grew to regret having given up her name. Yet it was with her new name that she, in 1942, embarked on yet another law degree to qualify as a fully-fledged American attorney. Throughout the 1940s Jews were still only partially accepted at

<sup>130</sup> My own emphasis: *ibid.*, at 277.

<sup>131</sup> As she phrases it, ‘For strangely enough, throughout my long relationship with him, he did not cite me even once, despite the fact that after I left Kelsen I began a career of writing incessantly, furiously, obsessively’: *ibid.*, at 263.

<sup>132</sup> Generally speaking, in his works Kelsen mainly relies on his own earlier work, earlier works by his predecessors and/or scholars from fields other than the law. He hardly ever quoted any of his contemporaries and/or students.

<sup>133</sup> Here I refer to Harold Bloom’s argument about the anxiety of indebtedness that self-appropriation involves: see H. Bloom, *The Anxiety of Influence: A Theory of Poetry* (1997).

<sup>134</sup> As Toril Moi argues about Simon de Beauvoir (but one can add here Hannah Arendt and Sabine Spielrein), these ‘types’ of women, still far too few to consider as a sociological phenomenon, have produced enough intellectual capital that endowed them with a different ‘gendered treatment’: this type of woman ‘will not be silenced, ignored, or relegated to subservient positions in the context where she appears. Paradoxically, it is the very fact that such a woman has become *impossible to ignore* that inspires the more outrageous sexist attacks on such women. Some patriarchal souls, and particularly those whose own position in the field is threatened in some way or other, find the very thought of a female *monstre sacré* extremely hard to swallow. But the very intensity of the sexist onslaughts on [such a woman] could be read as the *effects* of her legitimacy, rather than serious threats to that legitimacy’: see Moi, *supra* note 38, at 1039.

Harvard University and women were completely barred from the Harvard Law School, so Silving stopped her work with Kelsen, got herself funded by the 'Jewish Education Foundation for Girls', and enrolled to study at the Columbia School of Law.<sup>135</sup> Silving completed her LL.B, passing the New York bar exam in 17 months, and as soon as she became an American citizen she started on the path to become an American lawyer/academic. In 1956 (after almost 20 years of professional insecurities), Silving got her first permanent position as a professor at the University of Puerto Rico. She was granted this post only after Kelsen rejected it and recommended her instead. Kelsen perhaps did not quote Silving's work, but even from his helpless position in the USA he managed to secure his female protégé a historical chance.

And Silving did not disappoint him: although formally a professor of criminal law, Silving's research covers an extremely wide range: from legal theory to international legal jurisprudence, the philosophy of law, criminal comparative law, international criminal law, the German penal code, legal theory, legal history, modern psychoanalysis, and the symbolic idea behind legal language. Throughout this time, together with her husband, Paul Ryu, she participated in American-Jewish commissions intended to help modernize Israel's legal system,<sup>136</sup> while she also maintained close contacts with NYU's President Ralph Slovenko, as well as Harvard law professors such as Louis Sohn and Erwin Reischauer, and other German-speaking émigrés including Fraenkel, Magdalena Schoch, and Heinrich Kronstein.

In 1996, Silving died in America, but she was cremated and buried next to her husband in Korea with the Star of David on her grave. A few years beforehand, she had completed a book dedicated to her *Memoirs*, often referred to in this article. This book can and perhaps should be read as her last attempt to gain some recognition that she had been denied, mostly because she was a woman.

## 6 Male Domination Constitutes the Paradigm (and Often the Model and Stake) of All Domination<sup>137</sup>

The history of international law (and politics) will remain incomplete as long as the academic endeavours undertaken by the 'suppressed others' remain neglected and/or

<sup>135</sup> Almost all Western countries exercised Jewish quotas and *numerus clausus* (official and unofficial) to varying degrees at least until the end of World War II. In the US, especially by WWI, fears of the 'European Jewish invasion' instigated the devising of new preventive methods. Columbia, Princeton, Harvard, and Yale began to impose informal but severe quotas upon qualified Jews seeking admission. There were, for instance, no tenured positions for Jews before the end of WWII. Only the end of WWII revoked the unofficial *numerus clausus* of Jews in most American colleges and universities: see, for instance, S. Klingenstein, *Jews in the American Academy, 1900–1940: The Dynamics of Intellectual Assimilation (Judaic Traditions in Literature, Music, & Art)* (1998), at 1–7; R.J. Simon, *In the Golden Land: A Century of Russian and Soviet Jewish Immigration in America* (1997), at 35.

<sup>136</sup> Here too Silving believed that it was a providential act that intervened again, guiding her to marry Ryu, 9 years younger than her, whom she met in Harvard in 1954. Although Paul was the 'most unsuitable potential marriage partner' because he was 'a Korean, second generation Presbyterian, son of a church elder, evangelized by missionaries', the couple shared similar academic interests and political commitments. As Helen confessed, Paul saved her 'from the disappointments and humiliations suffered at Harvard': Silving, *supra* note 9, at 124.

<sup>137</sup> Bourdieu quoted and translated in Moi, *supra* note 38, at 1035.

ignored by the traditional disciplinary corpus. In this article I voice Silving's contributions by situating her historically together with Hans Kelsen, her *Doktorvater*/mentor and arguably the number one jurist of the 20th century.

Silving's voice needs to be heard, not because she developed a counter/oppositional consciousness in international law, but because she did not: instead, Silving was successfully integrated into the male-dominated mainstream. In fact, she was so well assimilated that she was silenced and neglected. As argued above, the effectiveness of the education structures can even be measured in accordance with how minority groups within those structures, such as women, identify with the inequalities these institutions promote to begin with. In spite of her experiences of exclusion, but perhaps because of her gender-based rejection, she succeeded in internalizing the mainstream male-dominated habitus of the field to the extent that she believed in its legitimacy: after all, her exclusion only energized her to insist on being recognized by those who cast her out in the first place. Undoubtedly, her familial, social, economic, and even religious conditions contributed to her desire to fit in as well.

In many ways, Silving's own explanation for her success, however forgotten, is most revealing: as she herself argues, her triumph is the result of several acts of providence: it was not her hard work, intellectual abilities, commitment and ambition that gave her the chance to become the first woman law professor in America. It was in the hands of God, mere chance, and/or even Kelsen! Somewhat ironically, this argument alone demonstrates the strength of the male hegemony within the profession. It is almost as if even she did not believe she deserved acceptance in the first place.

At any rate, Silving does not need to be remembered because she was a woman who successfully managed to – almost against all odds – 'survive' the predominant male consciousness. Silving's voice needs to be heard for the straightforward reason that she was there.