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SYMPOSIUM ON ANNA SAUNDERS, "CONSTITUTION-MAKING AS A TECHNIQUE OF INTERNATIONAL LAW: RECONSIDERING THE POST-WAR INHERITANCE"

FRANZ NEUMANN AND ERNST FRAENKEL ON THE LIBERAL DEMOCRATIC CONSTITUTIONAL PROJECT

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I want to explore a tension in Anna Saunders's rich argument because it confronts much scholarship critical of what we can think of as the liberal democratic constitutional project (LDCP), and which has its roots in debates in the late nineteenth and early twentieth centuries sparked by the Marxist critique of capitalism. The tension is between the following two claims that she makes in her article, "Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance."[1] First, LDCP focuses on the formal dimension of institutional design and thereby fails to pay attention to a significant dimension of a constitutional order: its material basis. In this case, the remedy might seem simple: "Pay attention!" The second claim, however, is that the formal structure of LDCP is formal in name only. It has its own material basis in the ideology of neoliberalism. If, then, one is concerned as Saunders is about a material basis that reproduces social inequality and economic exploitation, the remedy is to abandon LDCP. My exploration is through Saunders's attention to the divergent analyses of the Nazi state set out by Franz Neumann and Ernst Fraenkel in the 1930s as the launching pad for her investigation of the structure of thought that underpins LDCP and her suggestion that Fraenkel is responsible for the juridical turn in LDCP. I start with some biography, in part inspired by the way in which Saunders weaves the personal and the political into her narrative. It helps to show that the turn is not in itself problematic and, as I conclude, that material questions need to be posed and answered within the framework of a well-designed constitutional order.

Saunders's account of these jurists may be unique and should spark a wide-ranging discussion on her themes. She accurately identifies the crucial point of contention between them in Fraenkel's rejection of an analysis of the Nazi state structure as due principally to the capitalist underpinnings of fascism. He understood that state as two states side by side: the "normative state," which contained whatever remained of the law and institutions of the Weimar legal order together with the statutory regimes enacted after 1933 and implemented through those institutions; and the "prerogative state," which consisted of the apparatus of the Nazi Party wherein the leader's will was the ultimate source of authority.[2] Since the law of the normative state governed its subjects only as long as officials in the prerogative state did not find such government inconvenient, there was, he concluded, no rule of law in Germany.

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[1] Anna Saunders, *Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance*, 117 AJIL 251 (2023).

[2] Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship (2017 [1941]).

Fraenkel thus diagnosed the special features of the state as juridical rather than political-economic, and it is this turn to the juridical in post-war international thought about LDCP that Saunders finds problematic. She begins her argument with a quotation from a UN document of 2013/14 in which the author notes "a growing appreciation of both constitutional design as well as constitution-making processes in laying a foundation for inclusive, stable democracies." Saunders mentions that the author is one "Nicholas Haysom, then deputy special representative for the UN secretary-general for Afghanistan (political affairs)."[3] The identity of the author is significant for her because of the involvement of the United Nations in the attempt to design and manage the constitutional framework that would assist Afghanistan's transition to a democratic political order in which minorities, in particular women, would have equal status.

The Rule of Law and Political Struggle During Apartheid

In 1982, I joined the Law Faculty of the University of the Witwatersrand in Johannesburg as a junior lecturer. I quickly gravitated to the people working at its Human Rights Center, the "Centre for Applied Legal Studies," founded in 1978 by John Dugard, the eminent international lawyer who had been my main influence during my legal studies at the same university. John had recruited a team of young left-wing labor and human rights lawyers who did pioneering work in the legal struggle against apartheid. Among them was Nicholas "Fink" Haysom, who in 1979 co-founded the human rights and labor law firm Cheadle, Thompson & Haysom Inc. to put the research done at the Center into practice. Fink, like several other prominent white activists, had decided on law as the way in which they could most productively continue the political activity in which they had been prominent as leaders of student organizations. This was not without risk. He himself was jailed four times and was a particular target because he acted as a go-between for the African National Congress in exile and opposition groups within South Africa.

I had majored in Political Science in my B.A. degree (also at Witwatersrand) and thought that the serious debate in political theory was between the culturally and socially attuned Marxism of the Frankfurt School and the austere structuralist Marxism of Louis Althusser and his followers in France, which allowed little if any role for agency in political struggle. In early 1980s South Africa, this debate did not seem esoteric. Cracks in the legal edifice of apartheid were opening. For example, reforms to labor law made it possible for Black South African workers to unionize and the space opened by such reforms raised the question whether entry would be fruitful for political struggle or would result in the complete capture of the entrants by the state apparatuses that secured the operation of the capitalist mode of production peculiar to apartheid South Africa.

Fink and I thus decided to teach a seminar on "Marxism and the Law," which we did within a graduate degree with the title "Industrial Sociology Honours." The students who took the course were political activists and their numbers were swelled by other young activists who audited the class. Among the readings were essays by the Frankfurt School lawyers, notably Neumann; and I recall that Fink, the majority of the students, and I were on the Neumann side of the debate, the side that argued that legal space was worth contesting. I think we also took seriously the idea that what made it so was that—to quote from E.P. Thompson (another of our assigned readings)—the rule of law is an "unqualified human good."[4]

Fink went on to an interesting career, playing a role in the negotiations that produced South Africa's post-apartheid Constitution. He was appointed as Chief Legal and Constitutional Adviser in the Office of President Nelson Mandela from 1994 to 1999, and thereafter to a series of positions at the United Nations, as an adviser on human rights and constitutionalism. It is thus hard to imagine someone more attuned to the concerns raised by

[3] Saunders, *supra* note 1, at 255.

[4] E.P. Thompson, Whigs and Hunters: The Origin of the Black Act 266 (1977).

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Saunders—someone who has thought more deeply, on the one hand, about how constitutional design interacts with both politics and the material basis of a constitutional order, and, on the other, about the role of international organizations in facilitating that interaction.[5]

This tale helps to make explicit, first, the stakes involved in choosing between the claim that LDCP needs to pay more attention to the material basis of constitutional order and the claim that LDCP's neglect of material basis is built into its formal structure; and second, why Saunders may be, or at least should be, more drawn to the first claim.

Social Democracy and the Rule of Law

Saunders introduces Neumann and Fraenkel as follows:

> I begin this Part by exploring the debate between two German and Jewish lawyers and legal theorists that emigrated to the United States in the 1930s and who were, in different ways, in conversation with their U.S. contemporaries: Franz Neumann and Ernst Fraenkel. I argue that this debate shows the particularity and limitations of a way of thinking about constitution-making that focused on institutions and formal rights, and how an approach that sought to relate those constitutional questions to a thicker understanding of social power was available.[6]

Saunders mentions that Neumann and Fraenkel were Jewish five times in her article, including in the abstract, but without explanation.[7] Here is one from Michael Stolleis's history of public law thought in Germany, an observation about Hans Kelsen and the Pure Theory of law he and his school developed in Vienna between roughly 1911 and 1934:[8]

> These "normativists" set their sights on a legal order that was only normative and virtually purged of ancillary sciences and metaphysics, all in an effort to reach a level of scholarliness that was appropriate to the pure legal proposition . . . . This would make legal scholarship unassailable against objections derived from both the concrete reality of the multi-ethnic state, and from morality and natural law, which was in the purview of the Church. For a class of scholars in which many were of Jewish background, and thus usually opted for democracy, rights of freedom, emancipation, and social balance, "scholarliness" was also the suitable platform to combat the anti-Semitism that had long since become virulent in Austria and the clericalism that to some extent went hand in hand with it. Consequently, the sharp separation of law from history, politics, and morality, and the corresponding insistence on "purity", was also a political response—dressed in the garb of legal theory—to the crisis of the Hapsburg Empire that was affecting all spheres of society.[9]

Now Neumann and Fraenkel, like Kelsen, were of "Jewish background," and "opted for democracy, rights of freedom, emancipation, and social balance," and Kelsen, like them, was a social democrat. It is also plausible to

[5] His reflections on these issues can be heard here.

[6] Saunders, *supra* note 1, at 273–74.

[7] *Id.* at 251, 254, 273, 274, 277.

[8] 1911 marks the publication of Kelsen's first major work in philosophy of law—Hauptprobleme Der Staatsrechtslehre Entwickelt Aus Der Lehre Vom Rechtssatze—and 1934 the publication of the first fully worked out account of the Pure Theory—Reine Rechtslehre: Einleitung In Die Rechtwissenshaftliche Problematik. Kelsen continued publishing until 1968. The list of his published works takes up pages 933 to 946 of his biography. *See* Thomas Olechowski, Hans Kelsen: Biographie Eines Rechtswissenschaftlers (2020).

[9] Michael Stolleis, A History of Public Law in Germany: 1914–1945, at 155–56 (2004).

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attribute to them "scholarliness" as a "platform to combat" the anti-Semitism that was as prevalent in Germany as in Austria. But they both rejected any "sharp separation of law from history, politics, and morality," and so one does not find in their work a "corresponding insistence on 'purity,'" on a theory of law as a formal system of norms unified by a hypothesized basic norm, with the further claim that the norms of any particular system can have any content.

This rejection perhaps explains why Saunders does not mention Kelsen, despite his fully worked out and influential theory of public international law and his invention of the institution of a dedicated constitutional court that would be the final decider of all constitutional disputes, an institution that is at the heart of the constitutional reforms of the post-war period.[10] And, as Natasha Wheatley has convincingly shown, Kelsen and his school played a pivotal role in the development of the idea of the sovereign state and its constitutional order that dominated the public international law imagination for much of the last century.[11] Kelsen, that is, seems a much better foil for Saunders's argument about the "particularity and limitations of a way of thinking about constitution-making that focused on institutions and formal rights." Indeed, in her Conclusion, Wheatley quotes David Kennedy's observation that Kelsen's theory appeared to many in the 1960s during the Cold War as a "leftover European philosopher who could never quite get with the program after the war . . . remembered as much for his tin ear toward specific international legal issues as for his old worldly philosophical arguments."[12] Wheatley adds that the "limits of [Kelsen's] . . . formal, normative system were never more apparent," and she cites Judith Shklar's incredulity that Kelsen did not seem to realize that "legalism," her term for a formalist approach to law, is not only a "political choice," but also one in favor of liberalism.[13]

However, there is a way in which Kelsen shares more with Fraenkel, and indeed with Neumann, than is usually thought to be the case, and it will bring me back to both Haysom and Saunders. Wheatley's highlighting of the quotation from Kennedy and her citation of Shklar's dismissive remarks are somewhat enigmatic given that much of her book is devoted to a magisterial and nuanced discussion of how Kelsen's Pure Theory was the fully conscious culmination of a series of attempts by jurists in the Austro-Hungarian Empire to make sense of a changing world order in just the way Stolleis describes. In addition, she immediately notes that in the late 1950s and thereafter, when a "string of coups d'état ripped through several postcolonial states," courts faced with pressing concrete questions about the legitimacy of the new order turned to Kelsen for answers.[14]

Moreover, the quotation from Kennedy does not describe his own view. Rather, it is the foil for his argument that Kelsen's Pure Theory provides the basis for a legal pragmatism of considerable contemporary relevance. The idea of the "legal" in legal pragmatism is important as it contains the clue as to the common ground between Kelsen, Neumann, and Fraenkel, which, with Neumann and Fraenkel, comes from a shared life experience, including some years practicing law together. They were protégés of Hugo Sinzheimer, the "father" of German labor law, who invented the idea of a "labor constitution"—a juridical basis for employer-employee relations that would not be wholly the product of top-down legislative reform since such reform should instead facilitate the activity of workers, organized into trade unions, in crafting the legal regimes that would bind them and their employers. In other words, the reform should create the legal space in which social democracy could emerge. It is this view of law as not a mere instrument of political and social power, but as a technique of intrinsic value for

[10] *See* Jochen Von Bernstoff, The Public International Law Theory of Hans Kelsen: Believing in Universal Law (2010).

[11] Natasha Wheatley, The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty (2023).

[12] *Id.* at 288–89 (quoting from David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 Am. U. Int'l L. Rev. 671 (1995)).

[13] *Id.* at 289 (referring to Judith Shklar's observations in her classic Legalism: Law, Morals, and Political Trials 38 (1964)).

[14] *Id.*

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ordering a society to promote both equality and freedom that set social democrats apart from the Marxists, even as they learned much from Marx's critique of capitalism.[15]

Neumann, in my view, despaired in the 1930s of the social democratic project, which is why his great work *Behemoth* for the most part opts for the side of the tension in Marxism that understands the state and its legal order as the instrument of the economic base, and so rejected what he nevertheless conceded was Fraenkel's "valuable" analysis.[16] But there is a personal reason as well. Neumann went into exile in 1933, while Fraenkel stayed in Germany until 1938, able to practice law because his military service in World War I exempted him from the 1933 purge of Jews from the professions. Fraenkel's book, *The Dual State*, is the product of his direct observation of what I in my work call the "politics of legal space."[17] More accurately, it is an account of what is lost when political power is no longer subject to the constraints of legality because the regime rules by prerogative whenever this seems in its interests. And here it is worth noting that the Constitution of post-apartheid South Africa, which Haysom helped to frame and then to nurture during his years as Mandela's legal advisor, has in this century been the major bulwark against the campaign of state capture for personal gain by senior figures in the African National Congress.

Conclusion

Saunders succeeds admirably in her aim to offer "international lawyers and constitutional theorists some ways to rethink what constitutionalism has meant and might yet mean in the coming decades . . . ."[18] But I have also suggested that it is a mistake to claim that Fraenkel provided what she calls a "technocratic focus on institutions and formal rights."[19] Rather, his is a careful analysis of what happens in the wake of the destruction of the rule of law, and thus is also a defense of the kind of view that Sinzheimer pioneered in Weimar and to which Neumann returned in the 1950s.[20] Moreover, Neumann turned time and again to Kelsen in his own attempts to understand how legal order provides a space for the kind of politics that social democrats with their commitment to both equality and freedom should embrace.[21]

I have recently argued that Kelsen, despite his positivism, is best understood as providing a "political legal theory"—an account of the interaction between international law and state law that explains the tight connection between the commitments to democracy, the rule of law, and constitutionalism.[22] As social democrats, he, Neumann, and Fraenkel knew that the material questions which that Saunders highlights can only be properly posed and answered within the framework of a well-designed constitutional order.

[15] Ruth Dukes, The Labour Constitution: The Enduring Idea of Labour Law (2014); David Kettler & Thomas Wheatland, Learning from Franz Neumann: Theory, Law, and the Brute Facts of Life (2019).

[16] Franz Neumann, Behemoth: The Structure and Practice of National Socialism, 1933–1944, at 516 (2009 [1942]).

[17] *See* Douglas G. Morris, Legal Sabotage: Ernst Fraenkel in Hitler's Germany (2020); David Dyzenhaus, The Long Arc of Legality: Hobbes, Kelsen, Hart, Ch. 5 (2022).

[18] Saunders, *supra* note 1, at 308.

[19] *Id.* at 282.

[20] *See* Franz Neumann, *The Concept of Political Freedom*, 53 Colum. L. Rev. 901 (1953).

[21] *See* Kettler & Wheatland, *supra* note 15.

[22] Dyzenhaus, *supra* note 17.

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