

ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

# Beyond Victimization: On the Lasting Relevance of Political Sacrifice

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## Abstract

The article thematizes the relevance of Paul Kahn's conception of political sacrifice for contemporary constitutional studies. Kahn's approach to political sacrifice is compared with another extremely influential theory of sacrifice, René Girard's theory of sacrifice. The main aim is to show why Kahn's view of sacrifice in constitutional orders escapes the logic of victimization that affects Girard's seminal work, and it provides a better understanding of a political conception of modern constitutional orders. In the final section, the article shows that although Kahn's version of political sacrifice is seen as the embodiment of the principle of sovereignty, it can be expanded beyond it.

**Keywords:** Political Sacrifice; Victimization; Constitutional Order; Scapegoat

## A. Introduction

What is distinctive of Paul Kahn's understanding of political sacrifice in the context of contemporary legal and social theory? This article argues that Kahn's concept of political sacrifice stands apart from other reflections on the topic in an original way because of the combination of three aspects: (1) The link that he establishes between love and sacrifice, (2) the avoidance of a notion of sacrifice based on victimhood, and (3) the continuing relevance of political sacrifice itself for a political conception of constitutional orders. The article will highlight these three aspects by reconstructing, in Section B, Kahn's understanding of *political* sacrifice and its place in his constitutional theory. Then, in Section C, in order to shed light over the originality of his contribution, a contrast with another (enormously) influential contemporary theory of sacrifice (namely, that advanced by René Girard) will be drawn. It might appear striking to see how little Kahn has engaged with Girard's works, but I will put forward the following explanatory hypothesis: Although both authors understand sacrifice as generative of order, they disagree on the diagnosis of the place of sacrifice in the contemporary political imagination at a very foundational level. Girard takes violence as the starting point and treats the sacred (and the sacrificial hypothesis) as a tool for containing the contagion and spread of violence itself. In Kahn's thought, the order of factors is reversed: The sacred a constitutive condition of the modern polity and its imagination. Without the institutionalization of the sacred, constitutional authority would become dysfunctional. In this view, self-sacrifice is a form of political action whose purpose is to give a peculiar meaning to political violence. Furthermore, Girard's take on

sacrifice is ultimately anthropological as he takes it to be part of the human condition; while in Kahn's thought, the sacrificial imagination is a cultural product.

Section D will introduce two *caveats* over the hegemonic place of a sacrificial imagination in Western contemporary constitutional orders. First, it is not necessary (as Kahn does) to postulate that political sacrifice is a function of modern sovereignty. Second, political sacrifice works as generative of order only if its meaning is embedded in myths and narratives that portray it as the action of an agent (and not a patient). But this means that the contest over the political imagination is crucial for the attribution of meaning to political violence. In other words, the struggle around how we imagine the political (and constitutional) salience of sacrifice is already a political struggle. Without recognizing this feature, the risk is to confuse sacrificial action with idolatry.

## B. Kahn's Sacrificial Hypothesis: Love, the Body, and Sacred Violence

Sacrifice is the theme that cuts across many, though not all, of Kahn's works. As presented by Kahn, sacrifice appears as an institution of the social imagination which, under certain conditions, can assume the meaning of a fundamental<sup>1</sup> political action. Although it is not entirely clear from his treatment in different works, political sacrifice is often presented as a cultural practice and not as an anthropological fact about human nature. Indeed, Kahn is not saying that political sacrifice is the only matrix truly generative of the social order; nor is he saying, in a normative fashion, that every society should be based on political sacrifice.<sup>2</sup> However, one cannot exclude that a sacrificial logic ultimately animates, in Kahn's work, the social—one could say, with Durkheim, that such a logic is constitutive of the “religion of society.” For in Kahn's view sacrifice is not only a narrowly political practice, but is also a constant presence in other fundamental social practices as well. One can count at least kinship (or family, in Kahn's parlance) and religion among the other social relations where a sacrificial logic is considered to be the ground of the practice itself. This means that certain social institutions can be sustained only as long as their members' imagination is supported by the (latent) perspective of sacrifice, or more accurately, of self-sacrifice. Noting the ubiquitous presence of sacrifice in Western societies, Kahn remarks that sacrifice “is not in itself a marker of the presence of the political . . . we should speak of sacrifice extending from the thick to the thin.”<sup>3</sup> Be that as it may, sacrifice is presented as a necessary (but not sufficient) condition for the definition of fundamental social institutions. There seems to be, also, a minimum common denominator and a common logic among all sacrificial activities: Creation requires the possibility of destruction.

As is well-known, Kahn detects the centrality of sacrifice in Western culture (and especially in the US political imagination) by applying his cultural study to the analysis of political and legal orders.<sup>4</sup> A cultural analysis of the phenomenology of sacrifice reveals that it is ultimately grounded on love. As we shall see, such a move allows Kahn to avoid certain pitfalls affecting other theories of sacrifice. It also avoids trapping the institution of sacrifice in the distinction between public sphere and private life, as sacrifice operates on a continuum across both. In other words, no dualism between different spheres of life applies to this conception of sacrifice whose effectiveness extends across the board. One can appreciate the difference with the classic liberal approach: Sacrifice is not the intermittent appearance in what would be otherwise a private-led life.<sup>5</sup>

Even more importantly, a cultural study of sacrifice reveals itself to be rather self-sacrifice or, to put it with Moshe Halbertal's felicitous formulation, someone's “sacrifice for” rather than

<sup>1</sup>Fundamental here means that the potential for political sacrifice is imagined and believed to be a condition of existence of the political and constitutional order.

<sup>2</sup>PAUL KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 114 (2008).

<sup>3</sup>PAUL KAHN, PUTTING LIBERALISM IN ITS PLACE 233 (2008).

<sup>4</sup>The classic reference is PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999).

<sup>5</sup>See HANNAH ARENDT, HUMAN CONDITION (2nd ed. 1998) (political sociology of citizenship); see also BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (dualist democracy).

“sacrifice to.”<sup>6</sup> Two important consequences derive from this assumption. The first one is that sacrificing is not a patient act, but rather an act of freedom. It goes without saying that this is not the freedom of choice between different individual preferences, but rather the freedom of identifying what one stands for. Second, if love is the basis of the sacrificial hypothesis, then it can only take a particularistic form of attachment which cannot be easily universalized. Love is indeed determinative of the type of exchange that comes to be symbolized by self-sacrifice. It is a marker of a different kind of social exchange that can be fully contained neither by the market nor by the law. While an exchange driven by other considerations than love or care can be properly understood in terms of reciprocal legal obligations, the mark of sacrifice over an exchange brings about a different cycle which cannot be fully regulated by law.<sup>7</sup> This is what makes sacrifice a potential symbol of self-transcendence. Short of a symbolic transformation of the self, sacrifice is reduced only to an exchange of one good for another.<sup>8</sup> One always loves or develops an attachment toward someone or something specific. Under certain circumstances, this attachment can come to mean to stand for something which, in turn, entails the possibility of standing against something else.<sup>9</sup> Kahn puts a lot of emphasis on the fact that this aspect of sacrifice cannot be regulated by law: Ultimately, although the willingness to sacrifice is necessary for the existence of the legal order, law and sacrifice “demarcate two forms of life.”<sup>10</sup> But, one could add, the lasting existence of legal institutions is parasitical on the other form of life.

The particularistic nature of the attachment behind sacrifice makes it the case that the standard of love is one of care. It is not surprising that, from this perspective, some of the main institutions of socialization (family, church, town, State) are believed to emerge out of an emotional attachment and not just individual interest. For this reason, the span of the sacrifice’s reach over social imagination is considerable and goes well beyond the sphere of politics:

[S]acrifice is at the heart of both politics and the family. Both parent and citizen understand themselves as subject to a demand for sacrifice. They recognize the demand as legitimate because they live in the world of meanings that the sacrificial act affirms. Sacrifice is, accordingly, the way of being in a meaningful world. Sacrifice . . . is an act of love.<sup>11</sup>

In this encompassing conception of the place of sacrifice in our social imagination, there is a material remnant. The vector (—or the bridge)—between a practice and its transformation into a successful symbol is the body. To understand love and sacrifice one must remain in the domain of the symbolic, but the bearer of that symbolic meaning can only be the flesh of the body. The symbolic dimension can be achieved only as long as the body functions as a bearer because the

<sup>6</sup>See MOSHE HALBERTAL, ON SACRIFICE 63–113 (2012). There are some important similarities between Halbertal’s notion of sacrificing for and Kahn’s conception, but there is also an essential difference: Halbertal maintains that “although self-sacrifice for another individual, value, or collective seems key to much of ethical life and political organization . . . misguided self-transcendence has a potential to lead to far greater evils and harms than those that are motivated by excessive self-love.” See *id.* at 4. It seems that, according to Kahn, the determination of sacrificial meaning is context-dependent: “[T]he distinction between sacrifice and meaningless death depends upon what we, collectively, make of the situation . . . Because these matters change over time, the circumstances of sacrifice tell us a good deal about the nature of a political regime.” See Paul Kahn, *Democracy and the Obligations of Care: A Demos Worthy of Sacrifice*, in DEMOCRACY IN TIMES OF PANDEMIC (Miguel Maduro & Paul Kahn eds., 2021).

<sup>7</sup>Halbertal’s definition of the exchange cycle initiated by love is apt: “[T]he sacrifice that as a gift seems to be part of an exchange cycle, is actually a symbol for a gift that cannot be reciprocated . . .” HALBERTAL, *supra* note 6, at 25.

<sup>8</sup>KAHN, *supra* note 2, at 108.

<sup>9</sup>Kahn is clearly closer to Schmitt than Arendt in his conception of politics, but his take on the distinction between friends and enemies is the following: “To stand for something is at least implicitly to identify an enemy . . .” KAHN, *supra* note 3, at 235. There is less concern, in Kahn’s thought, for the identification of the enemy as the non-homogenous other, since what determines the recognition of the enemy is a loving attachment.

<sup>10</sup>KAHN, *supra* note 2, at 98.

<sup>11</sup>KAHN, *supra* note 3, at 224.

body, while being a site of needs and desires, provides necessarily two essential tenets: Its existence is essentially connected to life itself and its material dimension makes the act of sacrifice “readable,” in other words, it makes exposure to sacrifice visible. Putting someone’s life at risk becomes publicly visible only because the body is at risk. It is only through the externalization of the willingness to risk one’s life that the body can transcend the particularity of desires and needs, and transform them into questions of political salience. One could say that the body is the bridge between the sacred and the ordinary. “Reading” the body and its signs is telling of the perceived meaning of a social action. It marks, quite obviously, the difference between torturing and self-sacrificing. In the former case, in fact, there is no control on the meaning of the scarred body, while this is not the case for the latter. In the last instance, a sacrifice allows the sacrificed to exercise some control over the meaning of the pain inflicted upon her body and it is within this measure of control that freedom emerges.<sup>12</sup> The attitude toward the symbolic body can be one of self-sacrifice, but also of murder: “[E]ach is a way of making the body bear the meaning of the world. In the West, the domains of the symbolism of the body have most prominently been those of family, state, and religion. Accordingly, here is where we find love and evil.”<sup>13</sup>

Sacrifice becomes *political* sacrifice when “it is linked to the reciprocal possibility of infliction of injury.”<sup>14</sup> Love plus the possibility of killing and being killed (or, more vaguely, inflicting pain) form an autonomous sphere of meaning: The political.<sup>15</sup> However, this conception of the autonomy of the political does not draw strict lines of separation between spheres or domains. The political manifests itself as a set of autonomous symbolic meanings that are not self-standing but can be projected upon everything else. For example, labor is not political in itself, but the possibility of becoming the source of a genuine political conflict cannot be ruled out. Therefore, class struggle can become very quickly political struggle. The same goes for the institutions of family or religion: In themselves, these practices do not display a political nature, but they can become politicized as long as they are invested by the symbolic meanings of a political sacrifice.<sup>16</sup> In other words, in modern times (that is, when the state has almost monopolized legitimate violence) any conflict over mundane and non-mundane questions is perceived as political if it can mobilize the caring attitudes of a group to the point where its members are willing to put their bodies on the line.

For this reason, almost anything can be politicized, though certain issues are more prone to that than others. Accordingly, it would be wrong to see in this remark the recognition of a strict separation between the ordinary and the extraordinary, as it happens in much scholarship inspired by Schmitt. In fact, “a world of sacrifice is equally a world in which the miraculous is

<sup>12</sup>It is at this point that the divergence with Giorgio Agamben’s notion of the *homo sacer* becomes evident and irreconcilable. According to Agamben, modern legal orders are incapable of both sacrificing and victimizing their subjects. They can only be killed or exterminated. This entails that, in Agamben’s view, self-sacrifice is unproductive: GIORGIO AGAMBEN, *HOMO SACER* (1998).

<sup>13</sup>PAUL KAHN, *OUT OF EDEN* 140 (2005).

<sup>14</sup>KAHN, *supra* note 3, at 234.

<sup>15</sup>While this clearly does not apply to kinship (where I take it that the possibility of being killed is sufficient), it remains to be seen whether religious sacrifice requires the same features as political sacrifice. Furthermore, it seems to be the case that if one is ready to kill for one’s cause, one should also be aware that this might put one’s life in danger for the reaction of the other side.

<sup>16</sup>At this point one can understand why Kahn criticizes Hannah Arendt’s neat separation between labor, work, and action. Indeed, Kahn’s critique of Arendt’s phenomenology of love is one of the most insightful. In the second chapter of *The Human Condition*, Arendt notoriously excluded love from the domain of action and constrained its phenomenology into the private sphere (that is, as a matter of privacy). See ARENDT, *supra* note 5, at 12–16. Love is therefore relegated to the strictly policed sphere of necessity in the household (protected by property) and loving is described as mutually exclusive with acting and speaking (the political activities in Arendt’s account). Arendt states that, “love, in distinction from friendship, is killed, or rather extinguished, the moment it is displayed in public . . .” ARENDT, *supra* note 5, at 51. Kahn comments in the following way: “This whole discussion . . . is profoundly wrong. Man is not first an animal, laboring for self and species in a meaningless world of pain the pain of childbirth is hardly the breaking out of a natural violence in the human world . . .” KAHN, *supra* note 3, at 200.

routine.”<sup>17</sup> There is always the possibility that ordinary politics becomes extraordinary by turning opponents or competitors into enemies. Intriguingly, the relation between extraordinary and ordinary politics remains decidedly outside of the scheme of traditional political theology. Although it cannot be explained in causal terms and the appearance of the extraordinary is often perceived as a miracle emerging out of the blue, in reality that appearance remains grounded on the transformation of the ordinary.

The explicit rejection of the sacrificial hypothesis by liberal political and legal theory is, according to Kahn, the main limit of liberal constitutionalism. The social contract and deliberative communication are among the best articulated liberal versions of explaining the formation and consolidation of political orders.<sup>18</sup> Kahn believes that the social contract, in particular, cannot pass the test of the political as it is a device still connected to individual pre-political interests. The liberal social contract cannot account for the formation of the community; at best, it can offer an understanding of violent death as negation and, as a consequence, a failure of reason which is usually represented by the state of nature.<sup>19</sup> It is not only the evacuation of sacrificial logic from the liberal discourse that is considered to be problematic. What is missing in the political theory of liberalism is a proper reflection about love and a recognition of the faculty of the will. This approach to the question of the political allows Kahn to add to his critique of liberalism an original argument beyond the one concerning political sacrifice, and extend it to political evil: “[L]iberalism fails to understand evil for just the same reason that it fails to understand love. Its horizon of explanation is framed by reason, on the one hand, and personal well-being, on the other. Between reason and interest, it can find no third term . . . Evil, accordingly, can appear to liberalism only as a failure of reason or as unconstrained desire.”<sup>20</sup> Ultimately, while liberal legal theory sees political violence as a failure in itself, Kahn imagines a different meaning to be attributed to violence according to the perspective one is observing that phenomenon from. Once again, liberalism can contemplate violence only as an evil because, as a view of the world, it does not recognize the role of love and it is concerned only with the body’s well-being.<sup>21</sup>

But love and violence, according to Kahn, cannot be fully dissociated. This is partially because the demands of an ethos of love are totalizing by definition: One can be in love only with a limited amount of specific objects (one can love, at one time, only one person, one religion, or one political community).<sup>22</sup> Therefore, far from being the end of politics, violence can be political because the demands of love tend toward the production of ultimate meaning. The stakes are high, and the vector of these demands cannot be but the body (this is true both of love and sacrifice). Given that the body carries the mark of loving (and the disposition to self-sacrifice) it is also vulnerable to violence. Acting for the sake of love, the risk is not self-sacrifice in the form of an exchange of a good for another (as, in common parlance, when we say that we have sacrificed something in order to obtain something else), but as the embodiment of an idea: “[W]hat love requires is a kind of self-destruction. Sacrificing for my family can suffuse my action . . . with extraordinary meaning. Sacrificing, I become a point of revelation of a larger meaning.”<sup>23</sup> Violence becomes

<sup>17</sup>KAHN, *supra* note 13, at 188.

<sup>18</sup>Here, Kahn’s main targets are the political theories of Rawls, Habermas, and Ackerman.

<sup>19</sup>The state of nature, from the perspective of Kahn’s theory, is part of the political imagination and not a pre-political condition.

<sup>20</sup>KAHN, *supra* note 13, at 53.

<sup>21</sup>In all fairness, Kahn is probably referring to classic liberalism in its utilitarian and deontological versions—for a shorthand, Humeans and Kantians. But there is also a strand of liberal perfectionism according to which it is not always the case that well-being constitutes a reason for action. Joseph Raz, for example, has explicitly theorized the morality of self-sacrifice against self-interest, at least in certain cases. See JOSEPH RAZ, *ENGAGING REASON* 303–32 (1999). Yet, one important difference with Kahn remains: For Kahn, love and sacrifice are a matter of the will and they are deeply political, while Raz frames the conflict between sacrifice and self-interest still in terms of morality and contrasting reasons for action.

<sup>22</sup>KAHN, *supra* note 2, at 99.

<sup>23</sup>KAHN, *supra* note 2, at 108.

political violence (and sacrifice) when seen from the perspective of the demands of love. Outside of that setting (which, for the political, is sovereignty), there is murder (and, often, torture and genocide), but not sacrifice.

### C. Sacrifice as Victimization

It is common opinion that René Girard is one of the authors whose work has defined the terms of the debate on sacrifice. It is impossible to do justice in short order to the depth and width of his philosophy and literary criticism. Unlike Kahn, Girard developed an anthropological interpretation of the institution of sacrifice which has also an impact upon the understanding of the concept of evil and of social order. For this reason, a comparison between these two theories of sacrifice is appropriate and can shed light on the peculiar traits of Kahn's proposal. Given the vast range of themes present in Girard's work, the focus in this section will be almost exclusively on scapegoating and mimetic desire, perhaps the two most original and known contributions offered by Girard to the debate on sacrifice. According to Girard, desire is mimetic because it tends to imitate someone else's desire. It is this quality of desire that makes it into a potential source of violence as it generates a rivalry which can quickly become murderous. In this perspective, the object of desire is such because of a third party in the desiring relation. One does not desire an object because of the properties or qualities of the latter, but because a third party desires it. The object becomes, by definition, rivalrous: It cannot be appropriated by both subjects at the same time. Scarcity is perhaps the source of violence, but note that scarcity is generated by the logic of desire,<sup>24</sup> not by the social and political organization. What is primordial, in this scheme, is not religion, but violence.<sup>25</sup> The first killing generates a cycle of violence as it calls for further killings as revengeful reaction. Violence is contagious and, therefore, can easily escalate. Therefore, only a scapegoat and the following institutionalization of the memory of its sacrifice can de-escalate the cycle of violence. The scapegoat provides a point of convergence of people's envy and anger and, by becoming the passive receiver of social violence, it allows society to de-escalate (or sublimate) the general level of violent competition.<sup>26</sup>

The starting point of Girard's sacrificial hypothesis is simply breath-taking: There is no society that has been able to form and develop without relying on an original sacrificial mechanism. In other words, not only does a sacrifice always lie at the origin of a new social order, but it is also the precondition for moving outside of the state of nature. According to Girard, this is also a story told by many (if not all) of the founding Western myths. For example, Girard discusses at length Oedipus' myth, but more importantly, he believes that Jesus' crucifixion represents a turning point, because it is a story of the revelation of the scandal of sacrifice (and the necessity of overcome it through divine self-sacrifice).<sup>27</sup> Be that as it may, in order to be meaningful as sacrifice, the killing has to bear certain qualities. As already noted, the most important is that the sacrificed has to be innocent and should be targeted because not too close to the relevant social group, but also not too remote, otherwise the victim could not credibly become the receptacle of social violence. These qualities are necessary because the sacrificing of the victim will, first, stop violence and, second, allow the community to recognize (and often sanctify later in time) the victim as the enabler of social order. Breaking the cycle of violence is such a central problematic

<sup>24</sup>Insightfully, Moshe Halbertal notes that scapegoating is a device based on the anger (rather than anxiety and fear) of frustrated desire. However, "the first murder was not only motivated by jealousy; it came from an acute response to banishment and isolation. *The exclusion from the possibility of giving is a deeper source of violence than the deprivation that results from not getting.*" See HALBERTAL, *supra* note 6, at 20 (italics in the original).

<sup>25</sup>RENÉ GIRARD, *VIOLENCE AND THE SACRED* (1980).

<sup>26</sup>For the constitution of the sacred through scapegoating and its political implications see (*ex multiplis*), the recent and very rich analyses contained in these two edited collections: *THE SACRED AND THE POLITICAL* (Elisabetta Brighi, Antonio Cerella, & Michael Marder eds., 2016); *LAW'S SACRIFICE* (Brian Nail & Jeffrey Ellsworth eds., 2021).

<sup>27</sup>RENÉ GIRARD, *THE SCAPEGOAT* (1989).



feature of human communities that Girard sees the deployment of this mechanism not only in the comparative anthropology of different societies, but also in the vast majority of literary and artistic artifacts.<sup>28</sup> Violence and how to contain it are truly the original concerns of human societies.

Evidently, this involves an economy of sacrifice quite opposite to Kahn's. Crucially, Girard assumes that love "is a form of transcendence that never acts by means of violence, is never responsible for any violence and remains radically opposed to violence."<sup>29</sup> Violence is here depicted as a capricious act, almost a primordial force, and therefore incompatible with love. The unmasking of the ritual of sacrifice as scapegoating is an achievement in Girard's eyes as it demystifies the barbarousness and the injustice of this practice. Overall, in his analysis there is little sense of structural and systemic violence. The possibility of killing and being killed are rather irrational manifestations which do not bear on the material and social context. They are an inherent feature of human desires and its mimetic nature. A healthy social and political order has to expel or, at least drastically reduce, the presence of violence. In short, political order is generated by the taming of violence.

Ultimately, it is not surprising that Kahn has not engaged at length with Girard's work. To my knowledge, in the only instantiation of direct engagement, Kahn remarks on the mechanical and totalizing character of Girard's use of sacrifice. The ritualization of the scapegoat is also unsatisfactory as a force for maintaining the presence of the sacred.<sup>30</sup> The mediated character of the ritual might help in containing the spread of violence and allow citizens to go on with their ordinary lives, but it cannot fully control acts of self-sacrifice. Kahn's key observation, here, is that individual self-sacrifice cannot be mandated, not even by law. Ultimately, it remains an act of freedom, motivated by love and not by whatever is the driver of the containing or even the elimination of violence (though it might obtain that outcome). Moreover, according to Kahn, political sacrifice is not an act of purification.

Girard's theory is probably too close to a classic type of liberalism to retain an appeal over Kahn's political conception of sacrifice. In fact, the scapegoating mechanism brings about outcomes that are not so different from the standard social contract narrative. As it is in Girard's explanation of the ambivalent role of the victim, in the social contract tradition, violence and vengeance are delegated (but not renounced, nor fully transformed)<sup>31</sup> to the sovereign as well. Furthermore, in the scapegoating process there is no actual freedom but only victimization. As noted by Terry Eagleton, "Girard shows a proper compassion for the sacrificial victim; but he is less vigilant to the way in which that victim, by incarnating the violence of the social order, can appropriate and transform it."<sup>32</sup> The victim, being innocent by definition, cannot control the meaning of its own sacrifice. But, perversely (and Girard is aware of this consequence), becoming an innocent victim can bring with it a moral standing. As he notes, claiming to be a victim can provide paradoxically further ammunition for the persecution of other people.<sup>33</sup>

The limits of this understanding can be seen most glaringly in Girard's interpretation of the biblical book of Job. Girard recognizes the exceptional resistance of Job, but he is compelled to insert it into the scapegoat's frame. Yet, the mechanism of the scapegoat does not seem to work in this case, because unlike other innocent victims, Job resists the attempt of making him into a scapegoat. He is aware that he is being scapegoated and he actively refuses to become a symbolic victim. In brief, Job is openly resisting his own sacrifice. So, where Girard should be lauding Job's sacrifice as generative of social order, he has to speak of Job as a "failed scapegoat" and as a "victim

<sup>28</sup>See, e.g., RENÉ GIRARD, *A THEATRE OF ENVY: WILLIAM SHAKESPEARE* (2004).

<sup>29</sup>RENÉ GIRARD, *THINGS HIDDEN SINCE THE FOUNDATION OF THE WORLD* 214 (1987).

<sup>30</sup>KAHN, *supra* note 2, at 120–21.

<sup>31</sup>A discussion of whether Rousseau's demanding conception of the social contract might disprove this point is beyond the scope of this article.

<sup>32</sup>TERRY EAGLETON, *RADICAL SACRIFICE* 57 (2018).

<sup>33</sup>See RENÉ GIRARD, *I SEE SATAN FALLING LIKE LIGHTNING* 7–18 (James Williams trans., 2001).

of his people.”<sup>34</sup> It is interesting to see how rigid and mechanical the application of the scapegoating phenomenon to a figure like Job is. For the source of the generative capacity for ordering seems to spring, in this case, more from an active resistance to be sacrificed than to the scapegoating mechanism.<sup>35</sup> The interpretation of the book of Job shows the a-political understanding of the sacrificial mechanism and the rigidity of the doctrine of mimetic desire. Instead of celebrating the creative and strong resistance of Job, Girard tries to tell it as a story of only partially successful victimization.

It is time to take stock of this section, while according to Girard, the social order (and human culture) can only be generated by scapegoating and therefore by the process of victimization of an innocent; Kahn’s conception of political sacrifice maintains that one’s sacrifice is not that of a victim but, indeed, that of an active and caring citizen. Even when subjects are *prima facie* inertly exposed to the possibility of being sacrificed (as in the case, often mentioned by Kahn, of nuclear extermination),<sup>36</sup> they do not become political victims in a strict sense. Their bodies are exposed to the possibility of being annihilated but they carry the political meaning of the allegiance with the sovereign. In other words, political sacrifice has the potential to transcend victimization as it invests the body of what would otherwise be a victim with ultimate and fundamental political meaning. For obvious reasons, this is something out of the reach for the scapegoat mechanism. Indeed, it is possible to sum up the main difference between these two conceptions of sacrifice by remarking that the sphere brought into society by sacrifice is, according to Girard, not the sacred, but the holy.<sup>37</sup> Following this interpretation of Girard, one can grasp why the aim of his sacrificial hypothesis is to bring saintliness into politics. Only in this way, according to Girard, politics can become non-sacrificial and the cycle of violence contained when not stopped. However, a politics of sacrificial victimization generates only a limited political power which cannot account for the constitutive dimension of the modern principle of sovereignty.<sup>38</sup>

#### D. The Space of What Can Be Sacrificed and Imagination

We have seen why, from the perspective of constitutional theory, Kahn’s conception of political sacrifice is—for the constitutional theorist—more rewarding than Girard’s. Ultimately, Girard’s approach to the link between violence and sacrifice cannot account for the sacred foundations of the political community and the power-building relation between citizens’ beliefs and the constitutional order. In fact, in Girard’s view, sacrifice remains a scandal (an evil) and Christianity is the faith that has unveiled and overcome it. Within this worldview, political desires are not a sign of autonomy, but simply the outcome of mimetic processes.<sup>39</sup> Under these constraints it is difficult to account for a strong conception of autonomous political action.

Be that as it may, Kahn himself seems to harbor increasing doubts over the grip that political sacrifice maintains on our contemporary constitutional imagination. Clearly, he is not the only theorist of sacrifice to entertain this thought. Paul Dumouchel,<sup>40</sup> with reference to contemporary sacrificial actions by states and by terrorists, has reflected on the lack of their symbolic force. He can speak of an ineffective (or barren) sacrifice because of the incapacity of contemporary states to

<sup>34</sup>RENÉ GIRARD, *JOB: THE VICTIM OF HIS PEOPLE* (1987).

<sup>35</sup>See, e.g., GIANFRANCO RAVASI, *IL LIBRO DI GIOBBE* (2015) (interpreting the myth of Job along these lines).

<sup>36</sup>“The nuclear threat implicit in American politics perfectly expresses the ultimate value of that politics: [B]etter the destruction of the world than the failure of the United States. Nuclear policy also shows us that killing and being killed are reciprocal political phenomena . . .” KAHN, *supra* note 13, at 197.

<sup>37</sup>I take this point from WOLFGANG PALAVER, *TRANSFORMING THE SACRED INTO SAINTLINESS* (2022).

<sup>38</sup>See MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2011) (reconstructing public law as a process of shoring up political power).

<sup>39</sup>For a classic application which puts the emphasis on the conventionalist nature of mimetic desire, see MICHEL AGLIETTA & ANDRÉ ORLEAN, *LA VIOLENCE DE LA MONNAIE* (1982).

<sup>40</sup>PAUL DUMOUCHEL, *THE BARREN SACRIFICE* (2015).



elevate the sacrifice of their citizens into a symbol. This is the case precisely because, by often turning against them (and exercising violence against them), states transform their subjects into victims. Political violence is shown to be sterile and cannot support a stable order in a meaningful sense.<sup>41</sup>

One can see the emergence of a nagging doubt about the ordering potential of political sacrifice in Kahn's most recent book. The new institutional figure at the center of the analysis is not the soldier or the sacrificing citizen, but the volunteer that provides the foundation and the stability to the (local) political community.<sup>42</sup> In addition, in a recent edited collection on the impact of Covid-19 on our constitutional orders, the ethics of care—especially of the people employed in health care institutions—provides the grounds of political loyalty necessary for holding a community together.<sup>43</sup> In brief, Kahn seems to doubt that the political imagination of our societies can still manage political violence in a way that is conducive to a politics of generative sacrifice.

It is difficult to disagree entirely with Kahn's sense of an incipient erosion of political sacrifice. All symbols of the sacred within political communities have known a progressive decadence in political life, especially in Western societies, and one cannot see why political sacrifice would not be subject to the same trajectory. Other rituals of connection between the sacred and the ordinary have not worn well. Take, for example, the case of constitutional oaths, whose rituality seems increasingly empty, and with little legal relevance, despite their symbolic function in establishing the good faith of the guardian of the constitution.<sup>44</sup>

Nonetheless, it seems still too early to declare a full disenchantment toward sacrifice. A few signs point toward this direction, and I will mention two of them. First of all, it is still possible to observe examples of willingness to sacrifice in cases of exercise of constituent power. The most recent and obvious example, in 2019, is the *estallido social* in Chile. The intensified manifestations showed a resolute willingness to be exposed to a strong repression for a relatively long period of time. Even more strikingly, this social movement has not been organized or led by a political party. The willingness of the protesters to put their bodies on the line conjures up the potential for political sacrifice.<sup>45</sup> It is not surprising that attempts to exercise constituent power continue to manifest a willingness to self-sacrifice: On the one hand, constituent power is a process of (re)definition of the collective self and much is at stake for the identity of the political community; on the other hand, constituent power is the epitome of an intense version of political action as it purports to manifest agency in one of its most autonomous instantiations.<sup>46</sup> It is true that Kahn

<sup>41</sup>This is how Dumouchel reads Arendt's banality of evil: There is nothing generative in the senseless sacrifice required to citizens and, for this reason, States' evil actions lack any depth because they cannot make the victims sacred (and not even their persecutors). What closes down the generative quality of political sacrifice is the anonymity of both victims and persecutors. Dumouchel is influenced by Girard's idea that political myths revolve mostly around the sacred character of the sacrificer who often becomes the sacrificed as well. See Paul Dumouchel, *La technique et la banalité du mal*, in JEAN-PIERRE DUPUY: DANS L'ŒIL DU CYCLONE 67–102 (Marc Auspach ed., 2009).

<sup>42</sup>PAUL KAHN, DEMOCRACY IN OUR AMERICA (2023). See also Benjamin Berger, *Political Theory and the Volunteer: Lessons from Kahn's Ethnography of "Our Happy Politics,"* in this issue.

<sup>43</sup>See generally DEMOCRACY IN TIMES OF PANDEMIC, *supra* note 6.

<sup>44</sup>The reference goes to political oaths, which have suffered a steadier decline. An impressive constitutional history of the institution of political oath is presented by PAOLO PRODI, IL SACRAMENTO DEL POTERE (1992). For an attempt to revive the constitutional responsibility of the President's oath in the U.S. constitutional order, see Evan Bernik, *The Morality of the Presidential Oath*, 47 OHIO N. U. L. REV. 33 (2023).

<sup>45</sup>However, given the disappointing outcome of the constituent process one could say, in Kahn's terms, that there was a failure to memorialize that political sacrifice. Some commentators, indeed, have identified the opportunity of moving beyond constituent power as the main lesson of the Chilean case. See, for a thoughtful critique, Sergio Verdugo, *Is it Time to Abandon the Theory of Constituent Power?* ACADEMIA (2022), [https://www.academia.edu/83101164/Is\\_it\\_time\\_to\\_abandon\\_the\\_constituent\\_power\\_theory](https://www.academia.edu/83101164/Is_it_time_to_abandon_the_constituent_power_theory).

<sup>46</sup>The literature on constituent power is too vast to be quoted here. The contemporary debate on the topic was started by THE PARADOX OF CONSTITUTIONALISM (Martin Loughlin & Neil Walker eds., 2007). See also, JOEL COLON-RIOS, CONSTITUENT POWER AND LAW (2020). Yet there is not much reflection in the literature on constituent power on its sacrificial dimension.

never uses the language of constituent power, but only that of sovereignty. However, the two concepts do not completely overlap, and an invitation to consider the centrality of self-sacrifice for constituent power is timely.<sup>47</sup> The key point here is that even a failed exercise of constituent power might generate a meaningful political sacrifice, especially for the following generation.

A second important point to be made is that exposition to self-sacrifice is a way of maintaining the sacredness of the political bond, but it is never an abstract institution. Its object is always *a concrete* political order and *a concrete* constitutional order. In other words, it is not the case that citizens are willing to sacrifice themselves for an abstract notion of a state or an empire. As it happens for kinship, it is always the emotional investment in one's own family that makes people willing to put at risk their bodies and not an abstract struggle for the idea or concept of family. The same applies to political communities. There is no doubt that the state—in its concrete particularity—has been the quasi-monopolist in animating the sacrificial passions in modern times. But there have been other concrete social institutions which have showed the capacity to require self-sacrifice from their members, starting from trade unions (especially under authoritarian governments). In reality, there is nothing that prevents other sites of political sacrifice to emerge in defense of different constitutional forms of association. If the genesis and preservation of political power remains central to contemporary constitutional theory, then it is difficult to imagine that the political can be reduced to a set of regulation or a market-based sets of exchanges. To the contrary, as long as questions of life and death remain central to political power (as it is unavoidably the case), the control over the meaning of self-sacrifice will always be a central feature of the role of political action in our constitutional orders.<sup>48</sup>

But this recognition brings us to an important feature of political sacrifice. The founding of a new constitutional order is rarely separated from the myths and narratives supporting it. This is also where the complications begin for a theory of political sacrifice. The relation between imagination and sacrifice can never be fully colonized by state power, though the latter is often successful in this enterprise in virtue of its coercive means. Interestingly, politically animated desires motivate attempts at challenging dominant interpretations of the meaning of political sacrifice with a view to offer alternatives. A clash around establishing motives and myths for self-sacrifice can always erupt because the production of political imagination is functional to the determination of what counts as valuable enough to make someone ready to self-sacrifice for a cause. At times, Kahn seems to imply that modern sovereignty has been generally successful in occupying the space of the sacred and hence in requiring total allegiance to its own subjects. However, this might come across as too quick. Indeed, Kahn himself seems to concede that the relation between sovereign power and its subjects can be multifarious.<sup>49</sup> It goes without saying that interpreting an act of political violence in terms of sacrifice, victimization or as brute slaughtering is not external to the shaping of the political imagination. Political sacrifices are often embedded in struggles around the content of the political imagination. Therefore, the narratives and the myths that emerge and bestow meaning over political violence are constitutive of the beliefs around the meaning of sacrifice. As discussed by Kahn himself, the choice for martyrdom, for example, comes across, from the perspective of the subject, as resistance against the violence of constituted powers. It should be added, as an important consequence, that it does not seem necessary, for the recognition of the meaning of political sacrifice, that it is productive of a sovereign order. Even

<sup>47</sup>For a distinction, in the history of political thought, between these two concepts, see LUCIA RUBINELLI, *CONSTITUENT POWER* (2021).

<sup>48</sup>See also HAROLD WYDRA, *SACRED POLITICS* (2015) (supporting this diagnosis with different accents).

<sup>49</sup>See e.g., KAHN, *supra* note 2, at 176 (“In the West, the sovereign has long been located in the state. If we approach the sovereign as the reification of an experience of the sacred through the action of sacrifice, then there is nothing necessary or essential in this political locus of sovereignty.”).

sacrifices that fail to install new constitutional orders can become the object of political myths and narratives.<sup>50</sup> The potential of self-sacrifice for animating political imagination and inspiring political action is not fully dependent on the successful establishment of constituted powers.<sup>51</sup>

It remains to be seen whether a misguided or misdirected narrative can generate political action that can be interpreted as willingness to self-sacrifice. The question, as noted by Halbertal, is of clear relevance for drawing a necessary distinction between idolatry and sacrifice.<sup>52</sup> Is self-sacrifice based on wrong or mistaken beliefs an act of love or idolatry? The question is more relevant than ever. Think, for example, of the spread of conspiracy theories which has at times triggered political violence, as in the cases of Pizzagate and of the Capitol Hill assault.<sup>53</sup> The topic is complicated, but it raises important questions for future research on political sacrifice. Can we talk of self-sacrifice in a context of collective deception?

## E. Conclusions

One of the great contributions of Kahn's conception of political sacrifice is that it offers to the constitutional theorist a political interpretation based on agency which can be usefully contrasted with the alternative tendency to identify the foundations of constitutional orders in processes of victimization and of legal protection of the victims. The article has tried to show why such a conception is more promising for contemporary constitutional theory. However, the article also invites us, in conclusion, to look for the relevance of acts of political sacrifice even when they are ultimately defeated, or when they are not conducive to the establishment of a new social order. For example, the sacrifices of a failed constituent moment might remain productive for the political imagination of future generations of political actors and be memorialized as such.

The concerns about the end of the sacrificial age cannot be easily dismissed, but perhaps we need to recognize the rich phenomenology and meaning of political sacrifice. Although the constitutive elements of political sacrifice are always the same, it should be admitted that "no theory of sacrifice manages to cover the phenomenon in its entirety."<sup>54</sup> In this sense, political sacrifice should be understood more as a dynamic than a static institution, the study of which is still rewarding for the constitutional scholar.

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<sup>50</sup>For an analysis of autonomous political myths see CHIARA BOTTICI, *A PHILOSOPHY OF POLITICAL MYTH* (2009).

<sup>51</sup>In this case, the question becomes more about what is strategically speaking an enabling political myth of sacrifice. An insightful primer on the danger of choosing ineffective myths is offered in FURIO JESI, *SPARTAKUS: THE SYMBOLOGY OF REVOLT* (2014).

<sup>52</sup>HALBERTAL, *supra* note 6, at 78 ("*[M]isguided self-transcendence is morally more problematic and lethal than a disproportionate attachment to self-interest.*") (italics in the original).

<sup>53</sup>For an in-depth examination of conspiracy theories and their political side effects see WU MING I, LA QI DI QOMPLOTTTO (2021).

<sup>54</sup>ROBERTO CALASSO, *ARDOR* 430 (2014).