

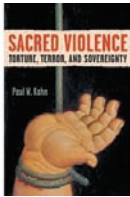
Law and Politics Book Review

Sponsored by the Law and Courts Section of the American Political Science Association

From: <http://www.bsos.umd.edu/gvpt/lpbr/reviews/2009/06/sacred-violence-torture-terror-and.html>

June 15, 2009

SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY



by Paul W. Kahn. University of Michigan Press, 2008. 248pp. Cloth. \$70.00. ISBN: 9780472070473. Paper. \$22.95. ISBN: 9780472050475.

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In our increasingly rights-based expressions of law and legality, the absolute prohibition of torture sits at the apex of domestic and international norms. Nevertheless, and as we are all aware, torture has not been eradicated. In SACRED VIOLENCE, Paul Kahn offers a deeply philosophical, reflective and beautifully-expressed treatise on why and how this is, basing his theory firmly in the assertion that, in spite of the aesthetic shift from sovereignty to law, there continues to exist a space beyond law; a space dominated by sovereignty in which sacrificial violence, including torture, plays a powerful expressive role. Making out this argument, Kahn masterfully interlinks history, politics, philosophy, international relations and law in what is a must-read book for all of us interested in understanding the uncomfortable but unavoidable reality that states still see a role for torture, particularly when confronted with terror. The book is certainly not easy reading for those who have placed their faith in the potential for an international legal order with a strong normative grounding in conceptions of human rights to have a restraining impact on states' behaviours, but that which is uncomfortable is nevertheless important.

As Kahn notes early in the book, criminal justice systems – both domestically and internationally – have progressively become more rights-based, procedure-driven and intelligence-oriented over the past decades, but that notwithstanding, “many of us have no confidence that modern criminal procedure will allow us to obtain the information we seek or that the ordinary tools of criminal punishment will have much relevance as either deterrence or punishment” (p.2). Therein lie three of the primary aims of state violence, whether that violence is seen as legally legitimate (as in the criminal justice paradigm) or illegitimate (as in the case of torture): information gathering, deterrence and punishment. Added to that, however, is the important expressive character of state violence, particularly when that violence is a reaction to what is perceived as an existential threat to our sovereign identity. For Kahn, we can never fully understand the practice of torture unless we think about the ways in which “violence creates and sustains political meaning” (p.4). Once we have done that we are likely to appreciate (although not welcome or enjoy the fact) that an absolute prohibition on torture “reflects a kind of

utopianism founded on an idea of a global order of law that never really emerged” (p.5). By the fifth page of this book, then, the human rights lawyer is both distinctly discomfited and deeply engaged – a state of affairs that persists throughout. [*372]

Kahn proceeds to elaborate on the close relationship between sovereignty and violence. This relationship, of course, is not new although it has changed as our conceptions of sovereignty have shifted from the sovereignty of the king to the sovereignty of the people. Violence has long been an expression of sovereign power – think, as Kahn compels us to, of the public violence of the scaffold and the ways in which such violence not only served as punishment (often resulting from a confession acquired through torture) but also as a spectacle designed to bring about “a combination of dread and awe before the sacred mystery of sovereign power” (p.25). In that context, torture produced truth – not, perhaps, epistemic truth but rather the truth for the tortured of their willingness to self-sacrifice and the truth for the torturer of sovereign power. Later in the book, Kahn demonstrates how this relationship continues to exist within the context of torture: the tortured sacrifices the self for ‘the cause’ and the torturer witnesses the production and expression of the sovereign power of the state in resistance to the terror that would challenge it (p.133). Through reaffirming sovereign presence, torture continues to produce this kind of truth and thereby to reaffirm sovereignty (p.31). As sovereignty moved from the monarch to the people, the link between sovereignty and violent sacrifice was not severed but rather transformed – rather than the state torturing its citizens, sacrifice became “an ordinary condition of life” (p.35) in the form of, for example, conscription (or the possibility thereof), and torture became an abuse of the citizen and of power (p.37). However, Kahn argues that to read this shift in the nature of sacrifice as a complete turn away from torture is to misinterpret it; rather than abandoning torture altogether, we continued to imagine ourselves a sovereign entity prepared to torture the enemy. “The torture of the enemy citizen,” Kahn writes, “is not the same kind of metaphysical mistake as the torture of the citizen. A regime that prohibits torture domestically could theoretically be reconciled with the pursuit of torture abroad” (p.41).

For Kahn, the historical conception of torture as “the performance of sovereign violence against enemies” makes possible the migration of torture “from an internal ritual of sacrifice to an external means of deploying the power of the state” (p.42). Preventing exactly such a migration was, of course, one of the purported aims of the development of an international legal regime that evolved over time from a system to regulate inter-state conduct, to one that regulates the relations between states and international institutions, to one that regulates not only inter-state and state-institution relations but also state-individual relations. This development is most clearly reflected in the growth and formalisation of international human rights law which has grown from the non-binding Universal Declaration of Human Rights to the creation and promulgation of binding covenants and treaties on human rights (including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), to the creation of juridical institutions to ensure accountability for human rights violations (including the International Criminal Court). This development happened on a wave of what seemed to be sweeping democratisation peaking in the aftermath of the Cold War. In this [*373] new paradigm, torture assumed the position of law’s antithesis (p.50) but

states' apparent willingness to move away from violence and constrain themselves (albeit subject to the somewhat malleable concept of "self-defence" in Article 51 of the Charter of the United Nations) was, Kahn claims, "somewhat surprising" (p.51). Less surprising, perhaps, has been the apparent "reappearance of sovereign violence" in the aftermath of the attacks of 11 September 2001 (p.53). This, for Kahn, reflects that fact that "[t]he autonomy of [international] law, including the privileging of the torture prohibition, was purchased at the cost of recognition of political reality" (p.59). As long as terror – which operates in the space beyond law – persists, so too will torture as a state response that also takes place in that sovereign space beyond law. This is particularly so since, while the enemy and the tactics of sovereign violence may have changed, "the imaginative construction of meaning through sovereign violence has not" (p.69).

Against this background it is of little surprise that, when considering ongoing moral and legal debates about whether, and if so, when and how to use torture in the 'war on terrorism,' Kahn urges us to rethink how we conceive of the ticking time bomb scenario that is so frequently used as the hypothetical through which the 'should we torture?' question is posed. This hypothesis raises moral and legal questions, both of which Kahn addresses at length in the book. His treatment of these questions, however, is particularly interesting for his well-made argument that how we conceive of rights (their content, their weight, and their restraining force) is very much dependent on our "background expectations" which may themselves shift in certain situations (p.74). Thus, the prohibition on torture was formulated and became a binding, enforceable legal norm against a set of background expectations that suggested the imperative was to protect the individual from the state. Where a state is a terrorist target, those background expectations and the imperatives that flow therefrom may change to a situation where it is the state that appears to need protection, this time from the individual terrorist (pp.74-75). This, Kahn claims, is "the inversion threatened by terror" (p.75). This claim causes us to consider where the fundamental justificatory claim of the absoluteness of the prohibition on torture might lie. Is this absoluteness really sourced in a profound opposition to torture per se, or is it the case that that international law contains no exceptions to the prohibition on torture "only because the drafters could not imagine the sort of asymmetrical disadvantage that the modern terrorist may pose to the state?" (p.75).

Rather than being based in the underlying grammar of human dignity, then, Kahn causes us to question whether the absoluteness of the prohibition on torture is a product of circumstance and whether we ought to reconsider that absoluteness given the change of circumstance and the emergence of a situation in which terrorists hold the potential to carry out destruction on a massive scale. This positivistic legal question is somewhat eclipsed in practice, of course, as in reality there never was a point in time at which the state would not use torture in its own defence; the absolute [*374] prohibition, Kahn writes, "is really nothing more than an expression of Western atheistic preferences regarding forms of violence" (p.76). Arguing for an absolute prohibition allows absolutists to enjoy the moral uplift of that position, but those who argue either against absolutism or for some kind of legal accommodation of torture in extremely limited circumstances are willing to take on "the burden of dirty hands" for the sake of political necessity (p.77). In essence, then, the prevailing debate surrounding torture – in the legal

scholarship at least – seems to Kahn to miss the point. This is not a debate about deontologist approaches v utilitarian approaches; rather it is about “our political commitment to defend [a] particular community against its enemies. The person to be tortured is always imagined as an enemy” (p.78).

If it is the case that the state will sometimes find it politically necessary to engage in such ‘sacred violence’ within the realm of sovereignty and beyond the realm of law, then the real task is not to come up with models of when and how torture might be used, but rather to properly understand the nature of political necessity and its difficult relationship to law and legality (p.83). Understanding that relationship is, of course, a matter of understanding the relationship between sovereignty and law and the point(s) at which the border between them lies. That border is not immobile; its position, as Kahn elaborates at some length, is very much dependent on time (the moment of terror at which the revolutionary/combatant/terrorist has the dual “experience of terror and transcendence” (p.137)), space and the territorial border (“every war imagines itself as a ‘pushing back’ of an enemy across a border” where that pushing back is literal or metaphorical (p.141)). Once the border has been crossed and the state reacts to behaviour that has a source outside of the law by engaging in “[t]he killing and being killed of war [that] occur[s] on a symbolic field of sacrifice and sovereignty, which simply cannot appear within the ordinary order of law” (p.151), torture becomes not only possible but a deeply expressive sovereign exercise; a showcase of “sacred violence.”

SACRED VIOLENCE is a complex, engaging and impressive piece of work that leaves the reader wondering whether, if violence really is such a formative and important sovereign expression, the entire project of law – particularly the project of international human rights law – has been a futile and largely optical exercise. It seems to this reviewer that such a conclusion is not what is intended by Kahn, but a way of imagining a situation where the state would not ever be engaged in that sovereign space beyond law – far less finding a manner in which to bring such a situation about – is difficult. Arguably this arises from the fact that Kahn appears to accept that the terrorism unleashed on the United States on 11 September 2001 is really representative of a type of violence that forces the state into that sovereign space in a new and more compelled way. In other words, the author appears to accept the ‘difference’ argument around Al Qaeda and modern transnational terrorist networks without interrogating that alleged difference to too great a degree. More of an engagement with that position would have been welcome, but this is – in the scheme of the book and the intriguing [*375] argument that it lays out – barely more than a quibble.

This book is disturbing, provocative, engaging, learned and essential; it challenges those of us who believe in international law’s autonomy and in the possibility of a world without sacrificial violence to revisit and interrogate the basic precepts and underpinnings of this belief and strive for more effective operationalisation. There is surely little more than one could ask of a book or an author than this.