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Rape and the Exception in Turkish and International Law

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Abstract

This Comment suggests, first, that Turkey's new (2004) rape law is indebted to recent trends in international sexual legislation, and second, that both Turkish and international rape law are in turn the product of a century of European exceptionalism. The 2004 Turkish criminal code is a text that has redefined the Turkish state's approach to issues ranging from torture to corruption to immigrant smuggling to rape and adultery. Fundamentally a domestic document, it is aimed at rearticulating and liberalizing the state-citizen relationship in Turkey. At the same time, it is emphatically an international text—a spectacle geared toward moving Turkey one step closer to European Union membership. As such, Turkey's criminal code is arguably political—representative of a twenty-first century collapse of law into ideology and a twenty-first century variation on the primacy of the sovereign decision in jurisprudence—even as it is couched in the apparent triumph of neutral, objective European liberalism. In other words, the 2004 criminal code is simultaneously an example of the exceptionalism first theorized by writers such as Carl Schmitt. This Comment begins with a brief history of the state of exception in Europe. It then links international rape law to these theories of exceptionalism. It turns to rape law in Turkey and the ways in which this law is indebted to both international law and the European history of exceptionalism, and it concludes by asking whether Turkey's aspirations to

* Assistant Professor of History, University of Massachusetts, Boston. I would like to thank Professor Louise Halper for inviting me to contribute to the Washington and Lee School of Law Symposium on Gender-Relevant Legislative Change in Muslim and Non-Muslim Countries and for encouraging me to develop this research project. I am also grateful to the other participants in the Symposium for their insightful comments on my work. Finally, I should note that I develop many of the arguments presented in this Comment in much greater detail in RUTH A. MILLER, THE LIMITS OF BODILY INTEGRITY: ABORTION, ADULTERY, AND RAPE LEGISLATION IN COMPARATIVE PERSPECTIVE (2007).

join the European Union are worth situating the nation's rape legislation within this problematic history of authoritarianism in Europe.

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I. Introduction

My starting point in this Comment is the 2004 Turkish criminal code—a text that has redefined the Turkish state's approach to issues ranging from torture and corruption to immigrant smuggling, rape, and adultery.[1] The 2004 criminal code is fundamentally a domestic document, aimed at rearticulating and liberalizing the state-citizen relationship in Turkey.[2] At the same time, it is an emphatically international text—a deliberate spectacle geared toward moving Turkey one step closer to European Union membership and thus, one step closer to "Western Civilization."[3] As such, Turkey's criminal code is

1. Yeni Türk Ceza Kanunu: Cinsel Dokunulmazlığa Karşı Suçlar [New Turkish Criminal Code: Crimes Against Sexual Inviolability/Bodily Integrity] [2004] [TCK] 6:5237 (Turk.), *available at* http://www.hukuki.net/kanun/5237.15.text.asp (last visited Oct. 19, 2007) [hereinafter New Turkish Criminal Code] (all translations of the text of the New Turkish Criminal Code are by the author).

2. For instance, an editorial in the Turkish mass daily newspaper, *Hürriyet*, argues that the criminal code is the product of at least one hundred years of women's rights activism in Turkey, and that it should not be presented as a response to European Union membership requirements. Emel Armutçu, *Değişiklikler AB için değil kahverengi gözlerimiz için yapılmalı* [*The Changes Should Not Be for the European Union but for Our Own Brown Eyes*], HÜRRIYET (Turk.), Sept. 5, 2004, http://arama.hurriyet.com.tr/arsivnews.aspx?id=254973 (last visited Sept. 11, 2007) (on file with the Washington and Lee Law Review).

3. For an overt example of the new criminal code as a spectacle, see *Batı basını: TCK reformu Türkiye'yi AB'ye yakınlaştırıyor* [*Western Press: The Reform of the Turkish Criminal Code is Moving Turkey Closer to the European Union*], HÜRRIYET (Turk.), Sept. 27, 2004, http://arama.hurriyet.com.tr /arsivnews.aspx?id=260577 (last visited Sept. 12, 2007) (on file with the Washington and Lee Law Review). The article analyzes the "western media" reaction to the criminal code's promulgation and tries to determine how much "closer" Turkey now is to Europe. *Id.*

unquestionably political—representative of the close relationship between law and citizenship formation, between the elaboration of legal norms and the "post-democratic spectac[le]"[4] that deprives these norms of all but their political meaning. Although the 2004 criminal code is couched in a rhetoric of neutral, objective European liberalism, I suggest that it is simultaneously a product of the exceptionalism first theorized by writers such as Carl Schmitt.

This Comment is divided into three parts, each addressing the various ways in which Turkey's rape law is the inheritor of a long-standing tradition of European exceptionalism and liberalism. Part II sketches, in broad strokes, a few defining characteristics of the state of exception as it has been theorized by twentieth and twenty-first century legal scholars. Part III addresses international rape law and its implicit demand for a state of exception. Finally, Part IV discusses the Turkish code itself and its debt to this international legislation. I suggest that both Turkish law and international law irrevocably politicize the bodies of citizens, that they turn these citizens into exceptional space, and that they thus represent a classically authoritarian appropriation of sexuality even while they speak the language of the liberal rule of law.

II. European Exceptionalism

A reasonable place to begin a discussion of European exceptionalism is the opening sentence of *Political Theology*, where Carl Schmitt argues that a sovereign is "he who decides on the exception."[5] This interpretation of the relationship between sovereignty and exceptionalism has been extraordinarily influential in recent analyses of authoritarian legal and political structures.[6] According to Schmitt, deciding on the state of exception—deciding when the rule of law will be suspended or when law will collapse into politics—is the most fundamental of sovereign rights.[7] Sovereign existence indeed relies upon the state of exception, and, as Schmitt continues, the relationship between sovereignty and exceptionalism is identical to the relationship between divinity

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4. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 10 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

5. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press 1985) (1922).

6. Giorgio Agamben, for instance, begins his 2005 book, *State of Exception*, with the same phrase. GIORGIO AGAMBEN, STATE OF EXCEPTION 1 (Kevin Attell trans., Univ. of Chi. Press 2005) (2005).

7. *See* SCHMITT, *supra* note 5, at 7 ("[The sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it.").

and the miraculous.[8] "The exception in jurisprudence," he argues, "is analogous to the miracle in theology,"[9] and just as the divine suspension of the laws of nature both defines and constitutes God, so too the sovereign suspension of the sovereign's law defines and constitutes sovereignty.[10] Each shatters a system of objective legal norms but, in doing so, each demonstrates the higher existence of law/sovereignty or law/divinity. What Schmitt is trying to do in his discussion, therefore, is to reintroduce this particularly *miraculous* aspect of sovereignty into politics—suggesting that sovereign relations are predicated upon an irrational, nonobjective, nonverbal acceptance of political power and arguing that sovereign legitimacy rests upon a miraculous absence of legality.[11]

This interpretation of law, politics, and the exception leads Schmitt to a second important point. In elaborating on the relationship between society and the sovereign, he argues that "the political is the total, and as a result we know that any decision about whether something is *unpolitical* is always a *political* decision."[12] This may seem like an obvious statement, especially for critics of liberalism, but it is worth emphasizing its juridical implications. What Schmitt suggests is the impossibility of a truly apolitical juridical system in *any* realm—authoritarian *or* liberal.[13] In addition to positing the simultaneously normative and miraculous nature of the state of exception, Schmitt also suggests that the state of exception produces a total state where the primary difference between or among political structures is a metaphysical one—the choice is between an unexamined political life and a self-conscious one, not between the political and the apolitical.[14]

In *Concept of the Political*, Schmitt discusses two final characteristics of the state of exception that are important in relation to contemporary

8. *See id.* at 36–37 (arguing that modern theories of the state may only be understood as secularized theological theories and discussing this notion in relation to the state of exception).

9. *Id.* at 36.

10. *Compare id.* at 7 ("Although [the sovereign] stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety."), *with id.* at 36 ("[T]he transgression of the laws of nature [occur] through an exception brought about by direct intervention, as is found in the idea of a miracle.").

11. *See generally* CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffrey Seitzer trans., Duke Univ. Press 2004) (1932) (expanding on the tension between legality and legitimacy).

12. SCHMITT, *supra* note 5, at 2.

13. *See id.* ("We have come to recognize that the political is the total, and . . . any decision about whether something is *unpolitical* is always a *political* decision, irrespective of who decides and what reasons are advanced.").

14. *See id.* (discussing Protestant theology and the creation of a "supposedly unpolitical doctrine" but concluding that the "political is the total").

international and Turkish rape law: first, the centrality of the "friend/enemy distinction" to political identity formation,[15] and second, the role war plays as a manifestation of this distinction.[16] According to Schmitt, the basic function of a political order is to decide who will play the role of public friend and who will play the role of public enemy.[17] Far more important to law and politics than the question of individual life or death is the question of collective political existence or collective political nonexistence.[18] Moreover, to the extent that the friend/enemy distinction plays out in practice, Schmitt posits warfare as its most significant manifestation. War, he argues, "is neither the aim nor the purpose nor even the very content of politics. But, as an ever present possibility, it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behavior."[19] Politics-as-law is thus likewise politics-as-war—even if waging war is neither the aim nor the purpose of political structures.

As Giacomo Marramao argues, this construction of the friend/enemy distinction and its relationship to the state of exception suggests a number of further corollaries.[20] Schmitt, for example, creates a situation in which "the closer a grouping comes to the extremity and purity of the friend-enemy antithesis, the more political it is."[21] As a result, "any aggregation of intensity close to the friend-enemy antithesis itself acquires an exquisitely political character, excluding the fact that it is manifested in religious . . . national . . . or economic . . . areas."[22] Furthermore, Giorgio Agamben notes that the "temporary" collapse of law into politics that defines the state of exception is

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15. *See* CARL SCHMITT, CONCEPT OF THE POLITICAL 26 (George Schwab trans., Univ. of Chi. Press 1996) (1932) ("The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.").

16. *See id.* at 35 ("War as the most extreme political means discloses the possibility which underlies every political idea, namely, the distinction of friend and enemy.").

17. *See id.* at 28–30 (discussing the importance of public enemies and the role of the State in determining the friend-enemy distinction).

18. Schmitt states:

> The authority to decide, in the form of a verdict on life and death, the *jus vitae ac necis*, can also belong to another nonpolitical order within the political entity, for instance, to the family or the head of the household, but not the right of a *hostis* declaration as long as the political entity is an actuality and possesses the *jus belli*.

Id. at 47.

19. *Id.* at 34.

20. *See* Giacomo Marramao, *The Exile of the Nomos: For a Critical Profile of Carl Schmitt*, 21 CARDOZO L. REV. 1567, 1578 (2000) (discussing two consequences of the friend/enemy distinction).

21. *Id.* at 1579.

22. *Id.*

quickly becoming the norm: "[O]ne of the essential characteristics of the state of exception—the provisional abolition of the distinction among legislative, executive, and judicial powers—here shows its tendency to become a lasting practice of government."[23] More importantly, Agamben emphasizes the peculiarly *spatial* manifestation of the state of exception, arguing that it "represents the inclusion and capture of a space that is neither outside nor inside,"[24] and that "the state of exception is not a dictatorship . . . but a space devoid of law, a zone of anomie, in which all legal determinations—and above all the very distinction between public and private—are deactivated."[25]

Taken together, therefore, these analyses provide a number of insights into the state of exception. First of all, the state of exception produces (or, according to Agamben, *is*) a particular kind of political *space*. This political space is simultaneously outside and inside, temporary and permanent, and exceptional and normal. It is in every way a limitless space. Moreover, as Schmitt makes clear, it is not just that these apparently contradictory, defining characteristics of exceptional space exist alongside one another, but that they also imply one another.[26] The "miraculous" legitimizing function of the temporary exception reinforces the "rational" legality of the permanent norm, even as it violates and suspends it. Indeed, it is upon precisely the irrational, nonverbal, nonobjective, miraculous violation of the norm that sovereign power—and thus the norm—rests.

Second, the collapse of law into politics produces a politically-total version of sovereignty. There is no public and private, no political and apolitical. Decisions about what should operate outside the realm of the political are emphatically political themselves, and the only real choice that exists in this space is between denying the reality of politics and accepting it. Finally, the basic, and indeed, only function of exceptional politics, is to decide on the public friend and the public enemy. As a result, *all* relationships—economic, social, religious and, I will also suggest, sexual and reproductive—are inherently political because they necessarily tend toward reinforcing the friend/enemy distinction. There is no relationship in the state of exception that is not in some way aimed at describing this political opposition.

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23. AGAMBEN, *supra* note 6, at 7.

24. *Id.* at 35.

25. *Id.* at 50.

26. *See* SCHMITT, *supra* note 5, at 14–15 (discussing the importance of the exception and its relation to the norm).

III. Rape and the State of Exception in International Law

I would like to discuss the ways in which these theories of the state of exception have played out in practice—particularly the forms they have taken in the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY)—starting with the ICTY's ruling in the February 22, 2001 *Kunarac* trial,[27] which addressed accusations of mass rape in the Bosnian town of Foča.[28] A number of scholars have praised this ruling as a watershed in both international and national rape law because it affirmed and expanded what Debra Bergoffen has called "the principle of embodied subjectivity."[29] Most notably, the ICTY resituated the concept of "consent" for the purposes of rape law, effectively eliminating the possibility of a consent defense in a wartime rape or genocidal rape trial.[30] As Bergoffen argues, "in insisting on proof of genuine consent, the court determined that the situation of the woman, her capacity to give consent, not the quota of violence inflicted on her body, determines whether or not rape occurred."[31] Kirsten Campbell has likewise noted that the court "now understands the crime as a violation of autonomy," and that consent, therefore, "must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."[32]

All of this makes a great deal of sense. Clearly, consent means something quite different in a state of war than it does under "normal" circumstances, and the notion of a consent defense in a trial for genocidal rape is in many ways a disturbing one. At the same time, it is worth emphasizing what the implications of these ICTY rulings are in this redefinition of sexual crime. Basically, the court has moved away from a situation in which sex is a noncriminal act that, in certain circumstances (i.e., the absence of consent), becomes criminal and has moved toward a situation in which sex is a criminal act that, in certain

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27. Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment of the Trial Court (Feb. 22, 2001) (on file with the Washington and Lee Law Review).

28. *See, e.g., id.* ¶¶ 28, 30 (describing the conditions in Foča and the brutal rape of its female inhabitants).

29. Debra Bergoffen, *February 22, 2001: Toward a Politics of the Vulnerable Body*, 18 HYPATIA 116, 117 (2003).

30. *See Kunarac*, Case No. IT-96-23-T, ¶¶ 438, 442 (broadening the concept of rape by considering factors other than physical force, which may affect a woman's ability to consent).

31. Bergoffen, *supra* note 29, at 118. She also argues that "in focusing on the matter of consent and in using criteria of consent, rather than criteria of violence or pain, for determining whether or not a crime against humanity occurred, the court took note of the relationship between a woman's humanity and her sexual integrity." *Id.* at 119.

32. Kirsten Campbell, *Rape as a "Crime Against Humanity": Trauma, Law, and Justice in the ICTY*, 2 J. HUM. RTS. 507, 508–09 (2003) (citations omitted).

circumstances (i.e., the presence of consent), becomes acceptable.[33] The assumption in the latter is that sex is an act of bodily harm. Sex is a violation of bodily integrity. It undermines an individual's dignity and autonomy. The role of consent, therefore, is to mitigate the effects of these violations. In the very process of reinforcing women's subjectivity—by eliminating the humiliating effects of considering consent alone in rape legislation (effectively placing the burden of proof on the victim to show that she did not in fact "want it")—contemporary international law is effectively criminalizing all sex. Rape is a crime not because there is an absence of consent but because sex is an assault on politically defined bodily borders. The purpose of *proving* consent is, again, simply to turn what is *already* a crime—sex—into something slightly less horrific.

In a very straightforward way, therefore, the ICTY rulings have, first, turned women's bodies into political spaces in constant need of protection and, second, turned sex into something inherently criminal that, like torture, cries out for regulation. More than that, as Karen Engle has argued, both the ICTY rulings and the rhetoric surrounding them have "reif[ied] ethnic difference, diminishing women's capacity to engage in sexual activity with the 'enemy' during the war."[34] Indeed, although the "consent defense was most restricted in the appeals decision in *Kunarac*," Engle notes that the ICTY's "broad reading of 'armed conflict' suggests that all sexual relationships between Bosnian Muslim civilians and Serbian soldiers in Bosnia and Herzegovina could be seen as nonconsensual, expanding the reach of *Kunarac* well beyond Foča."[35] Finally, Engle suggests that this increasingly tight association between national identity and sexuality became particularly insistent in discussions of forced pregnancy, where "the coercive nature of rape"[36] played no role: "If a Serbian sperm implanted in a Muslim egg creates a Serbian child, lack of consent is not necessary to this outcome. Thus, all children born of such a union, consensual or not, would be *not* Muslim."[37]

We are presented, in other words, with a number of consequences of these ICTY rulings. The first is the blanket criminalization of sex—a criminalization predicated upon (a) defining certain political bodies as necessarily "violated,"

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33. *See* Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 804 (2005) ("[T]he ICTY's jurisprudence essentially makes consensual sexual relationships legally impossible, in some sets of circumstances, which would include those found in Foča.").

34. *Id.* at 784.

35. *Id.* at 803–06.

36. *Id.* at 794.

37. *Id.*

and (b) defining certain political spaces as "inherently coercive." Second, as Engle notes, this interpretation of sexual crime insists upon the reification of national difference. Bosnian women, according to this argument, are *incapable* of having legal sex with Serbian men. To the extent that sex occurs, it is a purely political act reinforcing the notion of the Bosnian/Serbian or friend/enemy distinction. The ICTY's interpretation of rape as a crime against humanity, therefore, produces a situation in which Bosnian women become political spaces determined above all by the state of war (or state of exception). The "crime" of sex becomes licit within these spaces if *and only if* it occurs as a means of reinforcing the Bosnian/Serbian or friend/enemy distinction. The ICTY's rape rulings can, in turn, only make sense if we assume that they were handed down within a state of exception.

The rhetoric surrounding the ICTY's rulings—both supportive and critical—makes this assumption of a state of exception, if anything, more obvious. It is in fact worth pointing out that the critics of this new legislation are by no means critical because they worry about the disappearance of women's political and sexual agency in recent sex law. Rather, their argument almost without fail is that the ICTY did not go *far* enough in declaring the exceptional nature of sexual crime. As early as 1996, for example, scholars were condemning, above all, the court's "legalism."[38] Ten years later, in the wake of *Kunarac*, the ICTY was likewise critiqued for failing to "address the nuances of . . . genocidal sexual terrorism."[39] Meanwhile, scholars of nation-state-based jurisprudence used these critiques of international law as a jumping-off point for applying and extending the ICTY's rulings to rape law in general. In 1997, for example, Amy E. Ray invoked the Bosnian genocide as part of a more general call for a redefinition of both war and rape:

> [G]iven the emphasis on invasion of physical territory as the impetus of war . . . we may be able to reconceive the notion of "war" in order to make human rights laws applicable to women "in the by-ways of daily life." We could . . . argu[e] that women's bodies are the physical territory at issue in a war perpetrated by men against women.[40]

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38. *See* Liz Philipose, *The Laws of War and Women's Human Rights*, 11 HYPATIA 46, 47–48 (1996) (arguing that the ICTY's adoption of rape as a crime against humanity only applies in the context of ethnic cleansing and thus is too narrow).

39. Veronica C. Abreu, *Women's Bodies as Battlefields in the Former Yugoslavia: An Argument for the Prosecution of Sexual Terrorism as Genocide and for the Recognition of Genocidal Sexual Terrorism as a Violation of Jus Cogens Under International Law*, 6 GEO. J. GENDER & L. 1, 18 (2005).

40. Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Contemplate the Injuries*, 46 AM. UNIV. L. REV. 793, 838 (1997).

Throughout 2005 and 2006, Catharine MacKinnon popularized and simplified this view. After presenting talks to a number United States law faculties throughout 2004 and 2005, she published an article in the *Harvard International Law Journal*, in which she argued that women are involved in a "constant civil war":

> [I]f violence against women were considered a war inside one country . . . much of what happens to women every day all over the world would be crisply prohibited by the clear language of Common Article 3 of the Geneva Conventions . . . . [T]he absence, for women around the world outside what are termed zones of conflict, of such guarantees for noncombatants in war puts women in the practical position of being combatants in daily hostilities, while at the same time generally being unarmed and considered criminals if they fight back . . . . [International law] does not envision conflicts in which it is . . . the boundaries of the person as a member of a group that are transgressed, and the sovereignty of members of a group of people to live life every single day that is infringed.[41]

What do these approaches have in common? First of all, as early as 1996 and 1997, advocates of a new rape law criticized something called "legalism." International legal norms were not enough because they did not sufficiently address rape as a violation of women's human rights.[42] What was necessary, therefore, was an exception, a violation of these formal norms that would legitimize women's sovereign status and therefore their relationship to law. What, after all, is "genocidal sexual terrorism"—occurring as it does in both times of war and times of peace—if not an act that assumes a state of exception? Objective, formal legal norms will never be developed to define, in the abstract, a "genocidal sexually terrorist behavior" that might then be applied to some individual accused of transgressing these norms. Instead, genocidal sexual terrorism is a decisionist concept that exists in exceptional space and assumes the suspension of law along with the hyperbolic legitimization of politics. Genocidal sexual terrorism has meaning only given the prior existence of a public friend/public enemy distinction.

But this friend/enemy distinction does not necessarily manifest itself solely in national or ethnic terms. As the passages from Ray and MacKinnon make clear, the distinction becomes even more obvious when the state of war is mobilized to remedy the jurisprudence of daily life. In both of these passages,

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41. Catharine MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 8, 15–16 (2005).

42. *See id.* at 15 (discussing the historical role of international law in state regulation and its unwillingness to regulate the actions of individuals).

war, as Schmitt puts it, "may not be the aim, the purpose, nor even the very content of politics. But it is an ever present possibility,"[43] and our political behavior must be specifically geared toward the reality of politics *as* war. Moreover, if national or international juridical systems are going to address this reality—the fact that women are the victims of constant, daily wartime violence—these systems need to do so not by legislating formal law, but instead by placing women into legally defined lawless space. Women need to inhabit "zones of conflict." If a woman exists, around her must extend lawless, exceptional, wartime space. Once this new politics has been established, women might then be protected by the Geneva Conventions, and this is a good thing.

Again, I want to emphasize this point: It is *not* by legislation that sexual crime will be addressed. It is by placing women, the victims of sexual crime, into the miraculous space defined by the state of exception. Doing so will restore "sovereignty" to women. Just as Schmitt saw civil war as "the ever-imminent normal state of affairs to which the sovereign state is the exceptional solution," and suggested "a kind of dictatorship that has as its sole task guarding the ever-present exception,"[44] Ray implicitly and MacKinnon explicitly see constant "civil war" as the normal state of affairs that must also be addressed by redefining sovereign space as exceptional space. They go even further than Schmitt, however, by simultaneously imagining this exceptional sovereign space as a space enclosed by the "boundaries" of a *woman's body* rather than by the boundaries of a *nation-state*—boundaries that indeed become *more* political than those of the nation-state, impervious to transgression, be it legal, political, military, sexual, or biological.

IV. Rape and the State of Exception in Turkish Law

How, then, have these interpretations influenced Turkish law? First of all, as I noted above, the articles addressing sexual crime in the 2004 Turkish criminal code are explicitly indebted to the trends in international rape law that the ICTY rulings initiated—indeed they conform more closely to these international norms than rape legislation in many other European states.[45] In

43. SCHMITT, *supra* note 15, at 34.

44. John P. McCormick, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers*, 10 CAN. J.L. & JURISPRUDENCE. 163, 169 (1997).

45. France and Italy are the most notable, although both these countries' rape laws have moved in a similar direction as Turkey. *See* CODE PÉNAL [C. PÉN.] arts. 222–23 (Fr.), *reprinted in* 31 THE AMERICAN SERIES OF FOREIGN PENAL CODES 109 (Edward M. Wise ed., Edward A. Tomlinson trans., Fred B. Rothman Publ'ns 1999) ("Every act of sexual penetration, of any kind

the Turkish code, rape is defined as a "crime against sexual inviolability," and anyone who violates another's "bodily inviolability by sexual conduct" is punished.[46] The penalty is increased if the violation involves "entering an organ or device into the body." Spouses can be punished for violating one another, and the penalty is more severe when rape is committed by those in "public authority" or with "authority arising in working relations."[47] If there is a blood relationship, if a gun or multiple people are involved, or if the victim cannot protect him or herself bodily or psychologically, the penalty is also heavier.[48] Loss of health, recourse to battery, and use of force resulting in the victim's entry into a vegetative state or resulting in death all increase the penalty.[49]

In the Turkish code, bodily inviolability—linked to political subjectivity—is privileged above all else and is the object of attack in sexual crime. Sex is a violation of bodily borders, a trespass on political space. Sex is a crime against the integrity of this space, and therefore, it is the duty of the state to protect and to monitor the borders surrounding this space. Just as the ICTY paid little or no attention to consent or agency in defining and punishing sexual crime, here consent is also almost completely marginalized. At issue in the code is not the sexual agency of the Turkish citizenry but rather its security against potential threats to their simultaneously political and bodily borders. Indeed, this is made explicit in the very terminology used to describe bodily integrity—a terminology that obviously gets at the political nature of the crime.

Literally, *cinsel dokunulmazlık* means "bodily integrity," with the word *cinsel* a combination of "sexual," "generic," and "bodily," and *dokunulmaz* hovering somewhere among "inviolability," "political immunity," and most literally "untouchability." In Turkish, the phrase "bodily integrity" evokes—just as it does in English and French—mixed and overlapping connotations of biology, sexuality, uniformity, political identity, citizenship, and physical proximity. Thus, an attack on "bodily inviolability" is in no way a crime against "the individual" or the individual's ability to choose to engage in sexual activity. It is no more an attack on these things in the Turkish code than it was in the ICTY rulings or in the critiques of these rulings. It is a crime against

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whatsoever, committed on the person of another by violence, compulsion, threat, or surprise is a rape."); Amy Jo Everhart, *Predicting the Effect of Italy's Long Awaited Rape Law Reform on "The Land of Machismo,"* 31 VAND. J. TRANSNAT'L L. 671, 692–95 (1998) (discussing the important changes of the Italian Parliament's 1996 amendment to the country's rape law).

46. New Turkish Criminal Code, *supra* note 1.

47. *Id.*

48. *Id.*

49. *Id.*

simultaneous bodily and political boundaries—an assault on the Turkish nation-state via trespass of the biological barriers surrounding the sexualized citizen's body. It is a crime that can make sense only once the political, the legal, and the biological have collapsed into one another, only once a friend/enemy distinction has been established, and, in turn, only once a state of exception has been declared.

V. Conclusion

The new rape legislation in Turkey is thus a significant step forward in the Turkish government's quest to become recognized as "European." Turkey is a Muslim country with a foundational political ideology that places it squarely within Europe. It is the inheritor of a long-standing tension between "authenticity" and "civilization" that has been made only more complicated by its quasi-colonized position in relation to various European powers. But if our question is whether Turkey should or should not join the European Union—if our question is whether Turkish legal reform has or has not brought Turkey closer to that goal—it may be that these issues are less central than many scholars have assumed them to be. Perhaps a more pressing question to ask is what it means when crime—and sex crime in particular—is redefined in a country, like Turkey, as a means of appealing to a political grouping, like the European Union, which has wholeheartedly bought into its rhetoric of liberalism while ignoring its century-long tradition of authoritarianism and exceptionalism. What does it mean when the state of exception is mobilized as a means of preserving liberal values? And what does it mean, especially, when rape law is the target of these exceptional politics?

I have tried in this Comment to address these questions in a broad—but obviously incomplete—way. The state of exception, as it was theorized in the 1920s and 1930s by Carl Schmitt, appears to be alive and well in national, regional, and international politics. It has, without question, influenced the rulings of the ICTY, and likewise influenced the advocacy that both commends and criticizes these rulings. It has made possible the mobilization of "international" legislation in the name of "European" civilization,[50] and it has therefore provided an invisible framework for the Turkish legislation that seeks to turn Turkey into a European state. When I say that Turkish, European, and international rape law demands the imposition of a state of exception, however,

50. *See* Joanne Conaghan, *Extending the Reach of Human Rights to Encompass Victims of Rape:* M.C. v. Bulgaria, 13 FEMINIST LEGAL STUD. 145, 146–56 (2005) (discussing international law in the rulings of the European Court of Human Rights).

I should be clear that my goal is not simply to provoke or to suggest that these legal systems are embedded in an authoritarian or fascist tradition. Rather, I am trying to shift a number of key discussions that occur and recur around gender-relevant legislative change, and in particular around gender-relevant legislative change on the so-called margins of Europe or margins of the Muslim world: discussions about the meaning and purpose of sex law, about the relationship between sex crime and national or civilizational identity, and about the nature of sexual or political subjectivity. At the same time, although my intention is not merely to provoke, I will end this Comment with what is perhaps a confrontational question: Is European Union membership really worth turning the state of Turkey into Foča?