

## Editorial

*Gender in European and International Law*

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This issue of Merkourios is devoted to 'gender' in international and European Law. Yet, what is gender? In academic literature, sex is most often understood to refer to the biological aspects of being male or female and gender to social and cultural assumptions of what it means to be male or female.<sup>1</sup> Sex in this view refers to, for example, the differing reproductive capacities of men and women, whereas gender refers to the assumption that women will therefore also be better in changing diapers. This conception of gender is controversial because of its radical potential. Not only does it undermine presumptions about a binary category of sex and about the sex-based division of roles, but naturally following is the concept's potential to also seriously question heteronormative standards. On the one hand there are those who feel that people come (and also ought to come) in two types – men and women – which are mutually exclusive. If one is male, one is not female and vice versa. This view implies that the two groups are essentially different, which logically results in different roles being assigned according to one's biological sex. On the other hand there are those who regard gender – and sometimes sex too – as a social construct, implying that gender roles and heteronormative standards are not 'natural' and thus not inevitable at all and ought to be changed in order to improve the status of women and that of lesbian, gay, bi-sexual and transgender people (LGBTs in short), as well as realize a more genuine equality for all regardless of sex/gender.

Many international and regional bodies have drafted definitions of the concept, yet so far the international community has only once agreed on a legally binding provision at the international level.<sup>2</sup> Article 7(3) of the Rome Statute of the International Criminal Court (1998) states: "For the purposes of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." This definition has been aptly characterised as 'oddly worded and circular'.<sup>3</sup> It does, however, reflect the utterly divided views of states on the concept and on the role of sex/gender as an organising principle in society, and as such is clearly a compromise.

Outside academic circles and high-level international gender expert bodies, gender is still mostly understood as an equivalent for 'women'. However, this last decade or so two shifts in this 'traditional' focus have occurred. On the one hand a strong and effective LGBT rights lobby has succeeded in bringing LGBT rights within the realm of the legal gender concept. This, though, is not to say that women's rights and gender rights now go hand in hand! These two issues are still very often dealt with as entirely separate, and sometimes even as in opposition. Secondly, although as yet somewhat less familiar and visible, men have become a new focus of attention, including within international law. For instance, now that the harms of sexual and gender-related violence for women have become clear, it is increasingly understood that men may suffer these harms too. The (brief) discussion on whether the forced circumcision of the male political opponents of Kenyan president Kibaki constituted a form of *sexual* violence being a case in point.<sup>4</sup>

Another, related theme, relevant to the issue of gender and international law, was introduced in 1991 by Charlesworth, Chinkin and Wright. In a groundbreaking article these authors questioned the neutrality of international law from a gender perspective.<sup>5</sup> They argued that international legal norms are biased in that they pay too little attention to women's interests, because of dominant (male) standards and because of women's underrepresentation at the international level. They concluded that 'international law is a thoroughly gendered system'. This observation has met with considerable criticism.<sup>6</sup> The common thread in the comments being that this might be true as far as international law with direct relevance to individuals was concerned – as in international human rights law, due to the gender-based division of roles – but that this was not very likely to be the case regarding 'hard core' international law, such as the law of treaties.

Much has changed since the publication of the article by Charlesworth c.s. in 1991. International law has increasingly been analysed – and criticised – from a gender perspective. Yet, as predicted, research is still mostly focusing on international

1 See eg Joan W Scott, 'The uses and abuses of gender' (2013) 16 Tijdschrift voor Genderstudies, 63-77; Judith E Owen Blakemore, Sheri A Berenbaum, and Lynn S Liben, *Gender development* (Psychology Press 2009). Jeoren Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19 Human Rights L J 30, 34.

2 At the regional level, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul 2011) provides in Article 3(c) that "[g]ender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men". This convention has not yet entered into force because it requires 10 ratifications but had only received 4 by mid July 2013.

3 Valerie Oosterveld, 'The definition of "gender" in the Rome Statute of the International Criminal Court: A step forward or back for international criminal justice?' (2005) 18 Harvard Human Rights J 55-84, 56.

4 See ICC-01/09/02/11, PT Ch II (23 January 2012), paras 264-266.

5 Hillary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist approaches to international law' (1991) 85 The American J of Intl L, 613-645.

6 See eg Fernando Tesón, 'Feminism and international law: A reply' (1993) 33 Virginia J of Intl L, 647-684; Aaron Xavier Fellmeth, 'Feminism and international law: theory, methodology, and substantive reform' (2000) 22 Human Rights Q, 658-733. See also AHA Soons, 'Juridische vrouwstudies in internationaal publiekrecht' in EA Alkema and APhCM Jaspers (eds), *Lof der Verscheidenheid. Rechtsgeleerden over Vrouw en Recht* (WEJ Tjeenk Willink, 1993), 191-205.

law issues that directly affect the position of individuals, as international humanitarian law, international criminal law and international human rights law do.

These two interconnected themes – the meaning of ‘gender’ and its relation to international law – are visible in the contributions included in this issue. Although most contributions employ a classic interpretation of gender and focus on women – the articles on female suffrage by Van den Brink & Ten Napel, on reservations to the CEDAW by De Pauw, and on state obligations to address violence against women by Stedman, three other contributions have a different approach. Swatek-Evenstein focuses on the ‘other half’ of gender, that is men and the legality of male circumcision in Europe and Nozawa discusses the position of same-sex parents under the European Convention of Human Rights. The interview with the director of Anti-Slavery International up to a point arguably presents the broadest understanding of gender, in the sense that it does discuss the vulnerable position of women as well as of transgenders, but generally is not really focused on specific groups, but on themes that are relevant to the battle against slavery. Trafficking for sexual exploitation and domestic work, for example, are issues that do tend to affect women as a group more than men, but that is not *per se* the case for other forms of contemporary forms of slavery. The sex (or gender) of the victim does matter, not so much as such, but because the sex of the victim sometimes also is (part of) the cause of the problem. Victims of violence suffer, regardless of their sex. However, the sex of a victim sex often does impact the consequences – unwanted pregnancies being an obvious example. Similarly, a victim’s sex may be an indication of what made the victim vulnerable in the first place. In a horizontally segregated labour market, the options for women to find a decent, well-paid job are often much more limited than those for men. That - changeable - factor contributes to the chance that women become victims of sexual exploitation. Therefore, it is important to identify gender aspects to any situation, so as to take them into account when developing policies and programmes to combat problems such as contemporary slavery.

As for the second strand in the discussion on gender and international law, the contributions in this issue seem to underscore the scepticism of the critics of Charlesworth, Chinkin and Wright. All contributions relate to problems and issues in international law that are directly affecting individuals. That, however, does certainly not make them less valuable, as most of the topics discussed – think of gender-related violence (Stedman), the troublesome practice of many states to make incompatible reservations to the CEDAW (De Pauw) and contemporary slavery (interview with McQuade) – tackle very persistent problems, including those for international law. The article on male circumcision presents the exception to the rule by tabling a discussion that is as such not new for international human rights law. However it is when looked at from the angle of gender-bias in the framing the practice as victimising only women but not men.<sup>7</sup>

Interestingly, some contributions do not so much focus on gender *per se*, but use it as an example to discuss more general flaws or tendencies in international law. Nozawa discusses and criticises the European Court of Human Rights’ margin of appreciation and uses the example of same-sex adoption to illustrate her case. Van den Brink & Ten Napel apply democratic theory to a case of conflicting human rights, that is the clash of the freedom of religion with women’s equality.

Overall, this issue of *Merkourios* offers a kaleidoscopic view of some very topical issues in the field of gender and international law. Definitely recommended reading. ■

<sup>7</sup> See eg Marjolein van den Brink and Jet Tigchelaar, ‘Shaping genitals, shaping perceptions. A frame analysis of male and female circumcision’ (2012) 30 Netherlands Q of Human Rights, 431-459.