

NEW VOICES

GENDER AS A HYPERCONSTRUCT IN (RARE) REGIONAL HUMAN RIGHTS CASE-LAW

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Traditional legal accounts of sex and gender in international human rights law have either erased or emphasised the distinction between the two concepts. According to mainstream interpretations, there are two sexes, on the basis of which gender is constructed as a separate notion. Some of these interpretations conflate sex with gender. Others oppose sex to gender in the same way as nature to nurture and biology to culture. However, differentiation between the two concepts is not that straightforward. This paper demonstrates that alternative understandings to the sex-versus-gender dichotomy are possible, such as those reflected in the Inter-American Court of Human Rights' (IACtHR) advisory opinion OC-24/I7 and the European Court of Human Rights' (ECtHR) judgment X v The Former Yugoslav Republic of Macedonia. These decisions are two rare yet paradigmatic examples of what I call a 'hyperconstructivist' approach to sex/gender in the law. Hyperconstructivism goes beyond constructivist ideas of the cultural genesis of gender by considering both sex and gender as cultural by-products. If gender is the social construction of sex and sex the result of a cultural inscription at birth through the lens of gender norms, gender is the construction of a construction, that is a 'hyperconstruction'. Hyperconstructivism applied to human rights norms may serve as a theoretical frame to soften the tensions between the fixity of sex/gender-based legal categories and the ever-changing sexed/gendered nature of human experiences.

Keywords: sex/gender, human rights, regional courts, queer legal theory

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I. INTRODUCTION

A plethora of sociological and legal scholarship has been written on the notions of sex and gender. This paper advances a reinterpretation of both sex and gender as constructs in the international human rights legal system. Traditional legal accounts of sex and gender have either erased or emphasised the distinction between the two concepts. Some interpretations conflate sex with gender. Others oppose sex to gender in the same way as nature to nurture and biology to culture. Yet, the differentiation of the two concepts is not that obvious. Alternative perspectives can shed light upon the complex interrelation of sex and gender. This paper aims to address the question of sex and gender under international human rights law from what I call a 'hyperconstructivist' perspective. By this neologism, I refer to a specific approach that is embodied in two very recent and unprecedented decisions: The Inter-American Court of Human Rights' (IACtHR) advisory opinion *OC-24/17*¹ and the European Court of Human Rights' (ECtHR) judgement *X v The Former Yugoslav Republic of Macedonia*.²

Sex and gender have been traditionally interpreted in oppositional (sex-nature ≠ gender-culture) or derivative (biological sex $\xrightarrow{\text{determines}}$ social gender) terms. Against these interpretations, the hyperconstructivist approach incorporated in the above-mentioned decisions shows that (i) both gender

¹ *Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo* [2017] Corte Interamericana de Derechos Humanos OC-24/17.

² *X v The Former Yugoslav Republic of Macedonia* App no 29683/16 (ECtHR, 17 January 2019).

and sex are social constructs and (ii) tensions exist between the fixity of law and the indeterminacy of human experiences. With these premises in mind, the paper follows a tripartite structure. Section 1 explores prevailing interpretations of sex and gender under international human rights law. Section 2 examines the two hyperconstructivist decisions by highlighting the socio-legal novelties they introduce. Finally, Section 3, as an open-ended conclusion, reflects upon the meanings and implications of reconceiving sex/gender under international human rights law in hyperconstructivist terms.

II. MAINSTREAM DICHOTOMIES

Dichotomies of and within sex and gender permeate the human rights grammar and its jargon.³ International sources of human rights law and their connected interpretations incorporate the opposition of sex to gender, nature to nurture, and biology to culture. Definitions are rare and came quite late in the timeline of the evolution of the human rights system.⁴ The so-called 'International Bill of Rights' refers to sex as ground of discrimination but does not define either 'sex' or 'gender'. The Universal Declaration of Human Rights (UDHR) provides for everyone's right to enjoy the rights and freedoms it enshrines without 'distinction of any kind', including 'sex'.⁵ Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) prohibit sex-based discrimination in order to achieve the

³ This section draws partially on my previous work. I start from these well-known premises to build in the present article a renewed understanding of sex and gender under international human rights law: Giovanna Gilleri, 'Gendered Human Rights and Medical Sexing Interventions upon Intersex Children: A Preliminary Enquiry' (2019) 3 *Asian Yearbook of Human Rights and Humanitarian Law* 79, 103–106.

⁴ The only definition of gender enshrined in an international instrument is contained in Article 7(3) of the Rome Statute and is therefore outside the realm of human rights law: '[...] 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': Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

⁵ Art 2, Universal Declaration of Human Rights (adopted 10 December 1948) A/RES/810.

equality of men and women in the enjoyment of the rights enumerated in the Covenants.⁶ Similar provisions are contained at the regional level in the African Charter on Human and People's Rights (Banjul Charter),⁷ the American Convention on Human Rights (Pact of San José)⁸ and the European Convention on Human Rights (ECHR).⁹ The ICCPR also embeds the free-standing guarantee of equality before and equal protection of the law without discrimination.¹⁰ The Pact of San José¹¹ and Protocol 12 to the ECHR,¹² unlike the Banjul Charter, enshrine analogous protection.

Unlike the UDHR, ICCPR and ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopts an asymmetrical definition of discrimination, focusing on one sexed group, i.e. women, whose enjoyment of rights is to be gauged against another sexed group, i.e. men. CEDAW focuses on discrimination *against women* rather than *any* form of discrimination on the basis of sex.¹³ Discrimination is thus confined to *one* sexed identity group.¹⁴ CEDAW became the model for the definition of discrimination against women enshrined in the Protocol to

⁶ Art 2(2), International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Art 2(1), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷ Art 2, African Charter on Human and Peoples' Rights (adopted 27 June 1998, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5 (Banjul Charter).

⁸ Art 1, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OASTS 36 (Pact of San José).

⁹ Arts 1, 14, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR).

¹⁰ ICCPR (n 6) Art 26.

¹¹ Pact of San José (n 8) Art 24.

¹² Art 1, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS 177.

¹³ Roberta Jacobson, 'The Committee on the Elimination of Discrimination against Women' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press 1992) 446.

¹⁴ Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98, 147–148.

the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),¹⁵ although this excludes any reference to 'equality' between women and men.¹⁶ The Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)¹⁷ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)¹⁸ do not define discrimination against women.

The key instrument to understand the current prevailing interpretations of sex and gender under international human rights law is the CEDAW Committee's General Recommendation no. 28 (2010). This interpretive document codifies the sex-gender divide as sex-biology *versus* gender-culture.¹⁹ It reads:

The term 'sex' here refers to biological differences between men and women. The term 'gender' refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and

¹⁵ Art 1(f), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 (Maputo Protocol).

¹⁶ This choice was due to the refusal by some state parties of the draft guaranteeing equal rights for men and women; this relates to the equity versus equality debate, particularly lively in – but not exclusively – the African context: similar discussions were crystallised in the objections advanced during the drafting of and several reservations made to CEDAW: see Fareda Banda, 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force' (2006) 50 *Journal of African Law* 72, 74.

¹⁷ Art 3, Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) ETS 210 (Istanbul Convention).

¹⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) OASTS A-61 (Convention of Belém do Pará).

¹⁹ CEDAW, 'General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28 para 5; CEDAW, 'General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)' (2004) HRI/GEN/1/Rev.9 (Vol. II) fn 2.

disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.²⁰

The opposition of sex *versus* gender has become the dominant vocabulary in the language of human rights supranational actors.²¹ Indeed, a similar definition of gender is substantially reproduced at the regional level in the Istanbul Convention,²² while the Convention of Belém do Pará and the Maputo Protocol do not define either sex or gender. More recently, in 2016, the Committee on the Rights of Persons with Disabilities' (CRPD) General Comment 3 adopted a simplified, and simplistic, version of the definition of sex and gender contained in CEDAW Committee's General Recommendation no. 28. For the CRPD, "sex" refers to biological differences and "gender" refers to the characteristics that a society or culture views as masculine or feminine'.²³ In sum, mainstream interpretations posit that there are two 'natural' sexes, on the basis of which gender is socially constructed as a separate concept. Gender is built on the binary configuration of sex as male/female. The next section explores alternative understandings to this dichotomy reflected in the case-law of two regional courts.

²⁰ CEDAW, 'General Recommendation No. 28' (n 19) para 5; CEDAW, 'General Recommendation No. 25' (n 19) fn 2.

²¹ This section outlines the prevailing interpretations of sex and gender, while for reason of space it is not possible to analyse a number of alternative authoritative interpretations; these conceptualise sex, gender, their relation and the connected notions variously by, for example, describing gender in broader terms as including performances linked to both sexual orientation and gender identity; see, inter alia: UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2009) A/64/2011 para 22; UNGA, 'Thematic Study on the Issue of Violence against Women and Girls and Disability: Report of the Office of the United Nations High Commissioner for Human Rights' (2012) A/HRC/20/5 4; CAT, 'General Comment No 2: Implementation of Article 2 by States Parties' (2008) CAT/C/GC/2 para 22.

²² Istanbul Convention (n 17) Art 3.

²³ CRPD, 'General Comment No 3 on Women and Girls with Disabilities' (2016) CRPD/C/GC/3 para 4(b).

III. *HYPERCONSTRUCTING* GENDERED HUMAN RIGHTS

Other conceptions of sex and gender exist both within and outside legal sources. This section abandons mainstream dichotomies of sex *versus* gender in the human rights discourse in order to embrace an understanding of sex/gender as a hyperconstruct. This renewed understanding elaborates upon feminist and queer theory and leads to an original conceptualisation of sex/gender, mirrored in two human rights decisions. We can understand hyperconstructivism better if we first explore how the (pre)existing literature explores two of its most crucial components: on the one hand, the body and, on the other hand, the interrelation of sex and gender.

The interaction of sex and gender takes manifold configurations. Different conceptions arise from various disciplines. I identify and summarise some of them as follows. First, (1) 'relationalism' assumes that the articulation of supposedly isolated concepts is relational in nature; the ontology of sex and gender is therefore dependent upon the relationship between the two genders.²⁴ Second, (2) the notion of 'performativity' stipulates that individual performance reiterated vis-à-vis the other is constitutive of one's identity: we do not have a gender, we perform a gender. Judith Butler further elaborates on Simone de Beauvoir's account of becoming a gender – 'one is not born a woman, but rather becomes one' – conceiving of sex as a performance and the body as a site of interpretive possibilities.²⁵ Third, (3) 'sex-discourse' shares the anti-essentialist matrix with performativity. Gender is not inextricably linked to sex. Since discourse is one of many performative practices, sex-gender discourses produce bodies, or sexed bodies. There is nothing prediscursive in the human body and human existence. The sex-gender

²⁴ Cf Monique Wittig, *The Straight Mind and Other Essays* (Beacon Press 1992); Luce Irigaray, *Speculum of the Other Woman* (Gillian Gill tr, Cornell University Press 1985); Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1st edn, Pantheon Books 1988) 7, 81.

²⁵ Cf John L Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa eds, Clarendon 1975); Candace West and Don Zimmerman, 'Doing Gender' (1987) 1 *Gender & Society* 125, 13; Simone de Beauvoir, *Le Deuxième Sexe - Vol. I* (Gallimard 1949); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 151; Judith Butler, 'Sex and Gender in Simone de Beauvoir's Second Sex' [1986] *Yale French Studies* 35, 45; Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

discourse turns the individual into a sexed-gendered subject.²⁶ Finally, (4) 'sexuation', a concept drawn from Jacques Lacan's psychoanalysis, is the process through which the individual attributes their personal meaning to the externally-driven system of sex and gender. Sexuality does not derive directly from anatomy or cultural expectations, but rather from the subjectification of sex (nature) and gender (culture). Sexuation is the process through which the subject reinvents the socio-culturally conditioned body, forming a style of inhabiting the body forged by social expectations.²⁷

Added to these conceptualisations is what I refer to with the neologism 'hyperconstructivism,' which puts special emphasis on the configuration of both sex and gender as constructs. Simone de Beauvoir's above-mentioned account of becoming a gender triggered the wave of constructivism(s).²⁸ The genesis of construction swings between free will and determinism. On the one extreme, Simone de Beauvoir's constructivism is volitional, as it implies an agent appropriating a certain gender. According to Judith Butler's reading of de Beauvoir, gender is a series of repeated acts open to resignification.²⁹ For Butler, however, construction does not stem from a fully free choice, but occurs within cultural constraints. Butler's view is thus midway between free will and determinism. On a fully determinist view, if a set of cultural norms construct gender, the biology-is-destiny essentialist paradigm is replaced by culture-is-destiny. Eventually, both biology and culture determine the fate of gender.³⁰ The body can be *either* a passive medium to which culture ascribes meanings (determinism) *or* an instrument of appropriation and interpretation through which the personal will elaborates cultural meanings (free will).³¹ In any case, the body is a

²⁶ Cf Nancy J Hirschmann, 'Freedom, Power and Agency in Feminist Legal Theory' in Dianne Otto, Vanessa E Munro and Margaret Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 59–60; Michel Foucault, *Histoire de la sexualité: La volonté de savoir* (Gallimard 1976) 103.

²⁷ See Jacques Lacan, *Il Seminario. Libro XVIII: Di un Discorso che Non Sarebbe del Sembiante (1971)* (Antonio Di Ciaccia and Jacques-Alain Miller eds, Antonio Di Ciaccia tr, Einaudi 2010) 26; Massimo Recalcati, *Jacques Lacan: Desiderio, Godimento e Soggettivazione*, vol 1 (Raffaello Cortina editore 2012) 470, 481.

²⁸ De Beauvoir (n 28).

²⁹ Butler (n 28) 45.

³⁰ *Ibid* 11.

³¹ *Ibid* 12.

construction, assuming its own existence only after the mark of gender has been impressed.

Post- and decolonial feminist theorists have also shown that the body has not always been at the centre of the definition of gender and that body-oriented conceptualisations of gender were introduced in some societies by western colonisers. Colonisation imposed the idea that biology serves as a rationale to organise society by determining the social category of gender. Gender is, for these scholars, a western invention. For instance, Oyèrónkẹ́ Oyěwùmí explains that Yorùbá society did not rely on 'gender' as an organisational principle before colonisation. In Yorubaland, the body did not constitute the basis of a specific (gendered) social role prior to westernisation of society.³² For María Lugones, colonisation penetrated all aspects of social life, giving rise to new social (gender) and geo-cultural (racial) identities. Gender became a form of power well beyond a mere organisational principle. Colonisation forced into being various gender configurations in line with new racial constructs. Indeed, the 'coloniality of gender'³³ resides in the specific tool of domination used by western colonisers to alter the indigenous sense of self and identity.³⁴

The construction of gender may assume diverse connotations beyond the simplistic and exclusionary male/female polarisation. For instance, the polarisation of anatomy between male and female that is usually enshrined in human rights law is in tension with the actual variety of sexed bodies. Consider the array of intersex traits and gender identifications.³⁵ Sex and

³² See Oyèrónkẹ́ Oyěwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

³³ María Lugones, 'The Coloniality of Gender' in Wendy Harcourt (ed), *The Palgrave handbook of gender and development: Critical Engagements in Feminist Theory and Practice* (Springer 2016).

³⁴ María Lugones, 'Toward a Decolonial Feminism' (2010) 25 *Hypatia* 742; María Lugones, 'Heterosexualism in the Colonial/Modern Gender System' (2006) 22 *Hypatia* 186; on the untranslatability of manifold native sexualities deriving from complex indigenous social fabrics, see Caroline Cottet and Manuela Lavinas Picq (eds), *Sexuality and Translation in World Politics* (E-International Relations Publishing 2019).

³⁵ See Julie A Greenberg, Marybeth Herald and Mark Strasser, 'Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?' [2010]

gender occupy various points in a multidimensional space which cannot be compressed between two poles. An amalgam of chromosomes, genitals, reproductive organs, gonads, hormones and secondary sex characteristics constitute the so-called 'biological sex'. The binary conception of sex sees the biological sex as unambiguously either male or female, permanently and predictably aligned. This is essentialism: the belief that (in this case) sex as an identity category mirrors innate features comprising the deep nature of the members of that category.³⁶ Essentialist theories fascinate many given the clarity they provide: there is no confusion in the world of nature!³⁷ However, claiming that sex is biological is insufficient to establish that sex is (1) stable from birth to death and (2) located outside the sphere of culture and personal choice. According to hyperconstructivist approaches to sex/gender, nothing in the formation of sex/gender is purely natural, prefixed or perpetually unchangeable.

The legal form of hyperconstructivism solves a portion of the tensions between the fixity of law and the indeterminacy of human experience. By considering sex and gender as socially constructed, legal hyperconstructivism incorporates the variety of human sexed appearance and gendered behaviour into human rights norms. What does this mean in practice? The legal hyperconstructivist approaches discussed here may ensure protection of a broader group of individuals (if not all individuals) than those interpretations that advance essentialist and/or binary conceptualisations of sex and gender. The next two subsections explore the IACtHR's conceptual leap (Section II.1) and the ECtHR's terminological development (Section II.2) with regard to the relationship between sex and gender.

Michigan Journal of Gender & Law 13; Kenneth Zucker, 'Gender Identity and Intersexuality' in Sharon E Sytsma (ed) (Springer 2006); Alice Dreger and Sharon E Sytsma, 'Intersex and Human Rights: The Long View', *Ethics and Intersex* (Springer 2006); Judith Halberstam, *Trans*: A Quick and Quirky Account of Gender Variability* (University of California Press 2018).

³⁶ Mimi Marinucci, *Feminism Is Queer: The Intimate Connection between Queer and Feminist Theory* (2nd edn, Zed Books 2016) 5.

³⁷ Jeffrey Weeks, *Sexuality* (4th edn, Routledge 2017) 79.

1. *A Biological Construct*

Hyperconstructivism is not an insubstantial word floating in the world of theoretical ideas. The unique Inter-American development in the human rights conception of gender and sex demonstrates that the hyperconstructivist stance is emerging in the law. Relying on a study conducted by the Inter-American Commission for Human Rights,³⁸ the IACtHR defines sex in its advisory opinion *OC-24/17* as a '*construcción biológica*', i.e. the biological construct referring to the genetic, hormonal, anatomical, and physiological characteristics according to which a person is classified as male or female at birth.³⁹ Observing that the protection of sexual rights vary considerably across the states of the Organization of American States, the Republic of Costa Rica requested that the IACtHR interpret the scope of the rights to a name, the rights to privacy, and the right to equal protection of the laws under the Pact of San José.⁴⁰ Costa Rica inquired as to whether: (1) states shall 'recognise and facilitate the name change of an individual in accordance with his or her gender identity';⁴¹ (2) the lack of administrative procedures allowing for name change shall be considered a breach of the Pact of San José; (3) under the Pact of San José states must recognise patrimonial rights deriving from a same-sex relationship; and (4) states must establish a specific mechanism to recognise all the economic rights deriving from same-sex relationships.⁴²

The Court responded to these questions in the affirmative. First, it maintained that the Pact of San José protects the change of name and the rectification of public records and identity documents in conformity with an

³⁸ Comisión Interamericana de Derechos Humanos, 'Orientación Sexual, Identidad de Género y Expresión de Género: Algunos Términos y Estándares Relevantes: Estudio Elaborado Por La Comisión Interamericana de Derechos Humanos 'CIDH' En Cumplimiento de La Resolución AG/RES. 2653 (XLI-O/11): Derechos Humanos, Orientación Sexual e Identidad de Género' (2012) OEA/Ser.G CP/CAJP/INF.166/12 para 13.

³⁹ *Opinión Consultiva* (n 1) para 32(a); Comisión Interamericana de Derechos Humanos (n 38) para 13. The advisory opinion is available in Spanish only; the following quotes from the advisory opinion are my translations.

⁴⁰ *Opinión Consultiva* (n 1) para 2.

⁴¹ *Ibid* para 3(1).

⁴² *Ibid* para 3(5).

individual's gender identity.⁴³ Secondly, the IACtHR recognised the obligation for states to extend all existing mechanisms, including marriage, to same-sex couples.⁴⁴ The Court's interpretation of human rights law resulted in what some describe as a landmark advisory opinion, with potential impact on future judgments⁴⁵ and intimate connections to strategic objectives at domestic level.⁴⁶

Against this backdrop, let us return to the IACtHR's configuration of sex and gender. In certain respects, the IACtHR mimics the CEDAW Committee's General Recommendation no 28: 'Gender,' the Court stipulates, 'refers to the socially constructed identities, functions and attributes for women and men and the social and cultural meaning for these biological differences'.⁴⁷ It might therefore appear that the IACtHR reproduces both the nature-nurture divide between sex and gender advanced by the CEDAW Committee. However, as noted above, the IACtHR considers sex to be a 'biological construct': 'sex assignment is not an innate biological fact. Rather, persons are socially assigned a sex at birth based on the perception others have of genitals'.⁴⁸ The IACtHR thus argues that sex assignment at birth is

⁴³ *Opinión Consultiva* (n 1) paras 37, 40–43, 56.

⁴⁴ *Ibid* paras 54, 61, 74.

⁴⁵ The existence of at least twenty IACtHR's judgments applying a number of criteria formulated in previous advisory opinions might suggest that the Court considers its advisory opinions binding: Jorge Ernesto Roa Roa, *La función consultiva de la Corte Interamericana de derechos humanos* (Universidad Externado 2015) 107–108; yet the Court itself is cautious about the (supposed) binding nature of the advisory opinion at stake here: see, for example, *Opinión Consultiva* (n 1) para 72.

⁴⁶ Nicolás Carrillo-Santarelli stresses that the rationale behind Costa Rica's request for an advisory opinion relates to domestic politics; where the advisory opinion confirms the 'human rightness' of the policy objectives, international action is strategic to face domestic opposition by lowering the obstacles to the accomplishment of such policy objectives: Nicolás Carrillo-Santarelli, 'The Politics behind the Latest Advisory Opinions of the Inter-American Court of Human Rights' (International Journal of Constitutional Law Blog, 2018) <<http://www.icconnectblog.com/2018/02/the-politics-behind-the-latest-advisory-opinions-of-the-inter-american-court-of-human-rights/>> accessed 28 May 2020.

⁴⁷ *Opinión Consultiva* (n 1) para 32(e).

⁴⁸ *Opinión Consultiva* (n 1) para 32(b); cf IACHR and OAS, 'Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas' (2015)

socially determined. The combined reading of 'sexo' and 'género' as defined in the advisory opinion leads to an interpretation of both gender and sex as social constructs.⁴⁹ Gender is stripped of the biological determinism of sex, because the determination of sex itself is not an 'innate biological fact'.⁵⁰

Against these polarised configurations, the IACtHR applies the same approach to the social understanding of intersexuality, defined as 'the lived experience of the socio-cultural consequences of being born with a body that does not fit the normative social constructions of male and female'.⁵¹ For the Court, intersexuality refers to 'all those situations in which an individual's sexual anatomy does not physically conform to the culturally defined standard for the female or male body'.⁵² Conceiving of intersexuality in these terms has two consequences. First, (1) intersexuality is freed from the notion of sex as a biological determinant. What matters is not the supposed 'natural' appearance but rather the encounter between the individual and the society and how the latter interprets and categorises sex characteristics. From this, it follows that (2) sex, like gender, is a cultural norm and thus a social construct.⁵³

If gender is the social construction of sex and sex is the result of a cultural ascription at birth through the lens of gender norms, gender is the

OAS/Ser.L/V/II.rev.1 para 16 <<http://www.oas.org/en/iachr/reports/pdfs/violencegbtipersons.pdf>> accessed 15 April 2020.

⁴⁹ On the social definition of sex organs and the language of nature as a naturalised language, see, inter alia: Pierre Bourdieu, *Masculine Domination* (Stanford University Press 2001) 14, 64; Andrew Gilden, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23 *Berkeley Journal of Gender, Law & Justice* 83, 88–89.

⁵⁰ *Opinión Consultiva* (n 1) para 32(b); cf IACHR and OAS (n 47) para 16.

⁵¹ Miriam van der Have and others, 'Statement to the UN Independent Expert on Sexual Orientation and Gender Identity' (Public consultation convened by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Geneva, 25 January 2017) 2 <<https://oiieurope.org/wp-content/uploads/2017/01/Intersex-intervention-Public-Consultation-UN-IE-SOGI-25th-January-2017.pdf>> accessed 28 May 2020.

⁵² *Opinión Consultiva* (n 1) para 32.

⁵³ See Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Rutledge 1993) 1–2; Noa Ben-Asher, 'The Necessity of Sex Change A Struggle for Intersex and Transsex Liberties' (2006) 29 *Harvard Journal of Law and Gender* 51, 53.

construction of a construction, that is a *hyperconstruction*. Sex is anatomy, a concrete and natural fact. But sex becomes a construct when it is observed, interpreted and understood through the societal lens conditioned by a certain preconception of sex and gender. The conceptual paradigm within which sex/gender occurs varies from society to society, from time to time, from space to space: it is historically contingent.⁵⁴ Both sex and gender are points in a multidimensional space.⁵⁵ This multidimensional configuration concerns both categories because, as the hyperconstructivist stance holds, they are both constructs.⁵⁶ I refer to this approach as hyperconstructivist because it goes beyond constructivist ideas of gender as produced by culture, by considering both sex and gender as cultural by-products.

2. *A Changing Vocabulary*

Concluding that both sex and gender are culturally produced is not synonymous with affirming that sex and gender are exactly the same. Why do sex and gender have a separate social existence? In what way do gender and sex differ as social constructs? Sex characteristics are biological in their origins, but the determination of sex is not purely biological. Sex determination, as an interpretive exercise, draws an imaginary dividing line between several types of sexes – traditionally, just two. That is, there is a distinction between the object as it is and the description of that object as it is *seen*, between the 'original sex' (characteristics) and the 'constructed sex' (social marker). The notion incorporated in the legal category of 'sex' is the constructed sex, which derives from a social determination.

For example, a vagina (sex characteristic) is conventionally considered a typical trait of a female (sex) body as it is read through the social understanding of what a certain sex should look like. The biological component (vagina) is univocally associated with a socio-legal categorisation (female) following a process of interpretation of the human body resulting in the recognition of, in our example, a 'female' legal sex. This process leading to the construction of sex logically anticipates the ascription of gender. The latter condenses those identities, roles, attributes, responsibilities and

⁵⁴ Marinucci (n 36) 8.

⁵⁵ Anne Fausto-Sterling, 'The Five Sexes, Revisited' (2000) 40 *The Sciences* 18, 22.

⁵⁶ See Suzanne J Kessler, *Lessons from the Intersexed* (Rutgers University Press 1998).

cultural meanings ('men'/'women') attached to socially constructed determinations of the sexed body ('male'/'female'). However, the ontological divergence between the two is blurred. For instance, Butler argued that 'gender is not to culture as sex is to nature'⁵⁷ meaning that gender cannot be the culturally-driven interpretation of the supposedly prediscursive sex since the designation of sex itself is *gendered*, that is, subject to cultural conditionalities. Echoing Michel Foucault, Butler understands gender as the discursive apparatus whereby sexes are determined – and usually described as 'natural,' 'pregiven,' and 'politically neutral'.⁵⁸

The gendered social positioning of individuals is therefore hardly detachable from the sex that the social eye assigned to them. To borrow from Anne Fausto-Sterling, 'labelling someone a man or a woman is a social decision. We may use scientific knowledge to help us make the decision, but only our beliefs about gender – not science – can define our sex'.⁵⁹ The interpretation of bodies is a socio-cultural practice because the conception of anatomical sex is based on biological differences shaped by social interactions.⁶⁰ I have referred to 'sex' so far as the anatomical root of a certain gender. Yet 'sex' is often understood in its second meaning as sexual intercourse, sexual activity or lust. Sex overlaps with gender and sexuality.⁶¹ Admittedly, explaining the operational and conceptual distinction between sex and gender is an intricate

⁵⁷ Butler even argues that 'the distinction between sex and gender turns out to be no distinction at all': Butler (n 28) 9–10; cf Judith Butler, 'Variations on Sex and Gender: Beauvoir, Wittig, Foucault' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: On the Politics of Gender* (University of Minnesota Press 1987).

⁵⁸ Ibid.

⁵⁹ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 3.

⁶⁰ Tom Dreyfus, 'The 'Half-Invention' of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles' (2012) 37 *Australian Feminist Law Journal* 33, 39, 46.

⁶¹ On the conflation and separation of sex and gender, see respectively Gayle Rubin, 'The Traffic in Women: Notes on the 'Political Economy' of Sex' in Raina Reiter (ed), *Toward an Anthropology of Women* (Monthly Review Press 1975) 159; Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge & Kegan Paul 1984) 169–170.

effort, and one that I do not intend to accomplish here.⁶² Terminological choices matter, though.

Besides the IACtHR, another human rights system is in the process of re-laborating its terminological choices. The relationship between sex and gender and the hyperconstructivist stance is not conceptually explicit, but nevertheless linguistically evident in a recent decision of the ECtHR. In *X v The Former Yugoslav Republic of Macedonia* (2019), the ECtHR embraces the vocabulary of 'sex/gender' in a case on the right to private life and recognition of identity. The case concerned the absence of a legislative framework and effective remedy for legal gender recognition, as well as the imposition of genital surgery as a prerequisite for the sex/gender marker to be altered in official records. The Court held that the lack of a 'quick, accessible, transparent procedure for legal gender recognition' constitutes a violation of Article 8 ECHR.⁶³ Here, I concentrate on the changes in the Court's language, in particular its use of the term 'sex/gender', as evidence of a possible conceptual move towards hyperconstructionism.

'Sex/gender' appears throughout the decision with reference to the sex/gender marker on the birth certificate, in the civil status register and, more generally, in official records.⁶⁴ The legal sex, including the sex assigned at birth and reproduced in registers and documents, is seen through the gendered lens. This is the circle of (re)construction of sex/gender, which makes any sex *versus* gender division logically irrelevant. Sex is understood according to gendered categorisations. The notion of constructed gender is based on the notion of constructed sex. The terminological choice 'sex/gender' entails that the construct of gender is the means to interpret a complex of biological factors which are not natural but constructed. Overall, notwithstanding the regional courts' different hermeneutic positionalities vis-à-vis gendered human rights, the IACtHR's conceptual reformulation

⁶² Similar conceptual difficulties pushed Lois Bibbings to propose to talk of sex and gender as one thing: Lois Bibbings, 'Heterosexuality as Harm: Fitting In' in Paddy Hillyard and others (eds), *Beyond Criminology: Taking Harm Seriously* (Pluto Press 2004) 223–224.

⁶³ *X v The Former Yugoslav Republic of Macedonia* (n 2) para 78.

⁶⁴ *Ibid* paras 8–9, 12, 17, 19, 21, 30, 39, 41, 56–57, 67.

and the ECtHR's renewed vocabulary recognise that sex is culturally ascribed by the norms of gender.

IV. OPEN ENDING: TOWARDS 'SEX/GENDER' IN HUMAN RIGHTS LAW?

Albeit timidly, hyperconstructivism has penetrated the human rights arena. Claiming that both sex and gender are constructs does not make them sites of sheer abstract contention, void of control, of power and the like. It is not unintentional that the biologist Anne Fausto-Sterling accompanies the unifying concept with the adjective 'embodied' to avoid any deprivation of materiality.⁶⁵ Sex and gender operate upon our bodies and condition the way in which we understand and use our bodies. The effects of the interaction of sex and gender are entirely lived by human beings. The story of sex/gender in human rights law is a story of bodies, bonds, and – oh yes! – pleasure and pain. The consequences of this are both conceptual and terminological.

Neither sex nor gender is prediscursive, innate or pre-given. Gender is not the social side of the strictly biological side of sex. There is nothing natural about the designation of sex, which is also subject to cultural conditionalities.⁶⁶ If both gender and sex are social constructs, the analytical advantage of distinguishing between the two is unclear.⁶⁷ Considering sex and gender from a non-dualistic viewpoint stresses that the two concepts are separate yet interrelated.⁶⁸ Hence, in many cases sex and gender should rather

⁶⁵ Anne Fausto-Sterling, 'Gender/Sex, Sexual Orientation, and Identity Are in the Body: How Did They Get There?' (2019) 56 *The Journal of Sex Research* 529, 4.

⁶⁶ See, inter alia, Butler (n 28) 10; for an application of sex/gender to the analysis of international human rights law, see Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 198.

⁶⁷ Cf Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Service and Sweet and Maxwell 1997); Otto (n 69) 198.

⁶⁸ Anne Fausto-Sterling, *Sex/Gender: Biology in a Social World* (Routledge 2012); Victoria Pitts-Taylor, *The Brain's Body: Neuroscience and Corporeal Politics* (Duke University Press 2016); Sari M van Anders, 'Beyond Sexual Orientation: Integrating Gender/ Sex and Diverse Sexualities via Sexual Configurations Theory' (2015) 44 *Archives of Sexual Behavior* 1.

be referred to as 'sex/gender.' The latter recognises the contingent separability (/) of the two concepts, unlike alternative forms such as 'sex-gender' which creates an amalgam (-) of sex and gender. The IACtHR's advisory opinion and the ECtHR's judgment analysed above are two rare yet paradigmatic examples of a possible hyperconstructivist approach to sex/gender in international human rights law. With its inclusive and broad configurations of sex/gender, hyperconstructivism can provide human rights law with a theoretical frame to soften the tensions between the fixity of sex/gender-based legal categories and the ever-changing sexed/gendered nature of human experiences.