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“Because of ... sex”: Inspirations from the
European Court of Justice for the United States
Supreme Court in the
First Transgender Rights Case Before It

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Abstract

Nell'estate del 2020, la Corte Suprema degli Stati Uniti si pronuncerà sul caso *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, il primo caso relativo ai diritti dei transgender di cui la Corte sia mai stata investita. In assenza di leggi federali che proteggano le persone transgender dalle discriminazioni, la sentenza è destinata a diventare un punto di riferimento in materia, in particolare qualora la Corte dovesse rispondere affermativamente al quesito che le è stato posto, vale a dire se il Titolo VII del *Civil Rights Act* del 1964 proibisce le discriminazioni contro le persone transgender in base al loro status di transgender o agli stereotipi sessuali. La Corte di giustizia dell'Unione europea si è già occupata di analoga questione nel 1996, nella storica sentenza in *P. c. S. e Cornwall County Council*, in cui la Corte ha deciso che la Direttiva n. 76/207 del Consiglio relativa all'attuazione del principio della parità di trattamento fra gli uomini e le donne, che all'epoca - come oggi negli Stati Uniti - era l'unico atto legislativo disponibile, proteggeva le persone transgender da trattamenti discriminatori. Questo articolo intende offrire un contributo al dibattito sulla possibilità che il divieto di discriminare in base al sesso contenuto nel Titolo VII si applichi anche alle discriminazioni verso i transgender, analizzando la succitata pronuncia della Corte di giustizia e applicando i principi ivi utilizzati al caso pendente dinanzi alla Corte Suprema degli Stati Uniti.

In the summer of 2020, the United States Supreme Court will deliver its judgment on the first transgender rights case before it, R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission. In the lack of federal laws protecting transgenders from discrimination, the case will be a landmark, should it answer the question before it affirmatively, namely “whether Title VII [of the Civil Rights Act of 1964] prohibits discrimination against transgender people based on their status as transgender or sex stereotyping.” The ECJ has dealt with the same issue in 1996 for its landmark decision of P. v S. and Cornwall County Council in which the European Court has decided that

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Council Directive 76/207 on the principle of equal treatment for men and women, which -like the US situation- was the only available piece of legislation at the time, protected transgender persons against discrimination. This paper offers a contribution to the debate around whether the prohibition contained in Title VII to discriminate "because of ... sex" covers transgender discrimination by analyzing the said ECJ case, and applying the principles utilized therein to the case before the US Supreme Court.

1. Introduction

Aimee Stephens was terminated from the *R.G & G.R. Harris Funeral Homes*, where she had been working for six years as a funeral director, shortly after informing her boss that she intended to transition from male to female and would represent herself and dress as a woman while at work¹. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which, after conducting an investigation, brought a suit against the Funeral Home for violating Title VII of the Civil Rights Act of 1964 by terminating Stephen's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes². The case eventually found its way to the US Supreme Court, and the oral arguments were heard on October 8, 2019. The question before the Supreme Court is "whether Title VII [of the Civil Rights Act of 1964] prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)"³. Title VII of the 1964 Civil Rights Act reads:

"It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"⁴.

The question which the US Supreme Court has to answer can then be reformulated as "whether Title VII's prohibition of discrimination on the basis of sex should include discrimination based on gender identity". The judgment which will contain the answer is expected at the height of the presidential battle in the summer of 2020 and will either constitute a colossal setback for transgender rights in the United States or pave the way for long overdue equality steps for this community.

This paper aims to contribute to the heated debate around the question of whether "because of ... sex" covers transgender discrimination. It will do so by examining the European Court of Justice's 1996 landmark judgment for a preliminary ruling *P. v S. and Cornwall County Council*, which was the first case law in the world preventing discrimination because a person is transgender⁵. P., the applicant, was working as a manager in an educational establishment and was dismissed shortly after informing her boss of her intention to undergo gender reassignment.⁶ The questions referred to the European Court of Justice were (1) whether the dismissal of a transsexual for a reason related to a gender reassignment constituted a breach of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, and (2) whether Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibited treatment of an employee on the

1 Opinion United States Court of Appeals for the Sixth Circuit, No.16-2424, 07.03.2018.

2 *Ibidem*.

3 QP Report, Cert. Granted 04.22.2019 <https://www.supremecourt.gov/qp/18-00107qp.pdf>.

4 Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964.

5 S. Whittle, "Employment Discrimination and Transsexual People", Gender Identity Research and Education Society (gires) Report, 01.09.2014, <https://www.gires.org.uk/employment-discrimination-and-trans-people/>

6 Case C-13/94 P v S and Cornwall County Council [1996].

grounds of the employee's transsexual state⁷.

The striking similarity of not only the facts of the cases before the two courts, but also the legal questions to be answered, namely whether dismissal due to gender reassignment could be considered as sex discrimination, render insights from the European Court's analysis valuable for the Supreme Court's examination. The US Supreme Court does look at European courts in cases relating to LGBTI+, which highlights the relevance of such an analysis. The Supreme Court for instance, referred to the European Court of Human Rights in its landmark case *Lawrence and Garner v. Texas*⁸, while overruling *Bowers v. Hardwick*,⁹ which had upheld the constitutionality of State Sodomy Laws criminalizing homosexuality. In displaying the Western civilization's approach towards homosexuality¹⁰, the Supreme Court in *Lawrence v. Texas* cited the 1981 decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*¹¹, which had held that criminalizing homosexual acts violated the European Convention on Human Rights.

This paper first of all takes stock of the US Supreme Court's case law on LGBTI+ rights in general, then the situation at different levels of the US court system regarding transgender discrimination, in so far as it relates to understanding the issues discussed in *R.G & G.R. Harris Funeral Homes*; it then breaks down the issues debated before the Supreme Court in this case. Subsequently, following a brief overview of transgender protection at EU level, ECJ's analysis in the case *P. v S. and Cornwall County Council* is scrutinized, and the principles which were used to answer the questions referred to it are distilled and consequently applied to the questions before the Supreme Court in *R.G & G.R. Harris Funeral Homes*. The conclusions will contain answers to the questions referred to the US Supreme Court, should the US Court follow a similar approach as the European Court in its landmark judgment.

2. US Supreme Court on LGBTI+ rights

The constitutional struggle for equality for the LGBTI+ in the United States builds up on the foundation laid by the movements that precede it. Following *Brown v. Board of Education*¹² declaring racial segregation unconstitutional, the Supreme Court turned to issues such as contraceptive rights¹³, mixed marriages¹⁴ and abortion¹⁵, developing "a new category of constitution-based rights concerning the privacy of an individual"¹⁶. Even though the Constitution does not directly refer to the right to privacy, by broad interpretation of the Bill of Rights issues, Judges created this right, mostly by referring to the Ninth Amendment of the U.S. Constitution¹⁷, which states "the enumeration in the Consti-

7 Case C-13/94 P v S and Cornwall County Council [1996].

8 539 U.S. 558 (2003).

9 478 U.S. 186 (1986).

10 In disproving Chief Justice Burger's separate opinion making references to the history of Western civilization and to Christian moral and ethical standards.

11 European Court of Human Rights, 22.10.81, *Dudgeon v. United Kingdom*, n. 7525/76.

12 347 U.S. 483 (1954).

13 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

14 *Loving v. Virginia*, 388 U.S. 1 (1967).

15 *Roe v. Wade*, 410 U.S. 113 (1973).

16 P. Laidler, "Towards Equality and Justice: Challenges Faced by LGBTI Groups in Their Fight for Rights and Freedoms in the United States Supreme Court", in *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, 2011, ISBN 978-88-8420-702-9, p.111.

17 *Ibidem*.

tution, of certain rights, shall not be construed to deny or disparage others retained by the people"¹⁸. The US Supreme Court was not hasty in applying the right to privacy in cases involving LGBTI+ rights. In *Bowers v. Hardwick*¹⁹ - the first case before it relating to sodomy laws - the Court did not extend the right to privacy to cover private sexual conduct of LGBTI+, and consequently upheld Georgia sodomy laws as mentioned above. After this denial, it took the Court 17 years to re-visit the right to privacy in relation to LGBTI+ cases with *Lawrence v. Texas* in 2003.

In the meanwhile, in 1996 came the "first major victory of the homosexual community in the Supreme Court since the late 1950s"²⁰ with *Romer v. Evans*. The question before the Court was whether Amendment 2 of Colorado's State Constitution, forbidding the extension of official protections to those who suffer discrimination due to their sexual orientation, violated the [Constitution's] Equal Protection Clause.²¹ Amendment 2 precluded any judicial, legislative, or executive action designed to protect persons from discrimination based on their homosexual, lesbian, or bisexual orientation, conduct, practices or relationships and led to a denial of equal protection. In establishing the violation of the Equal Protection Clause, Justice Anthony Kennedy in his opinion for the court stated: "If the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"²².

In the landmark case *Lawrence v. Texas*²³ the Supreme Court was asked to answer, among others, whether the Texas "Homosexual Conduct" Law criminalizing same sex sexual relations violated the Constitutional guarantee of equal protection of laws, and whether criminal convictions for adult consensual sexual intimacy in the home violated the right to privacy. The Court concluded that the Texas statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual". The Court thereby extended the protection of "right to privacy" to same sex relations.

A decade later, in 2013, the Supreme Court was confronted in *United States v. Windsor* with the question of whether the Defense of Marriage Act (DOMA), enacted in 1996, defining the term "marriage" -for the purposes of federal law- as a "legal union between one man and one woman", deprived same-sex couples who are legally married under state laws of their Fifth Amendment rights to equal protection under federal law.²⁴ In its judgment overturning DOMA, the Court declared that the purpose and effect of DOMA was to impose a disadvantage, a separate status, and so a stigma on same-sex couples in violation of the Fifth Amendment's guarantee of equal protection. The next step came in *Obergefell v. Hodges*²⁵, which made same-sex marriages legal across the United States by declaring that denying marriage rights to same-sex couples would violate the principles of due process and equal protection guaranteed in the Fourteenth Amendment to the United States Constitution.

3. Protection of transgender persons by US courts

The cases mentioned, display a slow yet promising trend of extending the protection afforded by im-

18 Ninth Amendment to the U.S. Constitution of 1787, adopted in the Bill of Rights of 1791.

19 478 U.S. 186 (1986).

20 P. Laidler, "Towards Equality and Justice", cit., p.117.

21 517 US 620 (1996).

22 Accessed at: www.oyez.org/cases/1995/94-1039.

23 539 U.S. 558 (2003).

24 570 US 744 (2013).

25 576 US _ (2015).

portant principles such as the equal protection of the laws and right to privacy to homosexuals and same-sex couples. Zooming in on discrimination cases concerning transgender persons, and more specifically to their right to employment, this trend has proven to be even slower. Even though, until the case which is the subject-matter of this paper, no case made it to the Supreme Court, often due to the Supreme Court denying certiorari²⁶ there were still notable cases regarding discrimination against transgender persons at different levels of the federal court system and at state level. Before passing on to examining the case before the Supreme Court, namely *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, a short account is taken of the arguments of the different courts in the most noteworthy discrimination cases relating to transgender persons. This account taking is important to show that the arguments which have been successful in cases involving gay persons and same-sex couples, as explained above, have not been successful in condemning discrimination against transgender persons. Instead, a concept used in a groundbreaking Supreme Court judgment, not relating to transgender persons, *Price Waterhouse v. Hopkins*, namely "sex stereotyping" has been instrumental in turning the tide in discrimination cases regarding transgender persons. Since "sex stereotyping" as developed in Hopkins is also at the heart of the Harris Funeral Homes case, it is important to understand how this case has influenced the US Courts' decisions towards transgender persons. This section will first introduce the arguments of the courts in three notorious cases denying protection to transgender persons, *Grossman v. Bernards Township Board of Education*, *Holloway v. Arthur Andersen and Ulane v Eastern Airlines Inc.*; it will then present the "sex stereotyping" theory in *Price Waterhouse v. Hopkins*, and then establish the effects this case, and this theory, had in transgender protection.

In *Grossman v. Bernards Township Board of Education*²⁷, the Superior Court of New Jersey found justified the discharge of Paula Grossman from teaching after undergoing sex reassignment surgery in 1971 due to potential psychological harm to her students who had previously known her as a male²⁸. Previously, in the case concerning the tenure hearing of Paula Grossman, the same court had also dismissed Grossman's argument that her Constitutional rights to equal protection of the laws were violated with her dismissal, stating that "it has not been demonstrated that the standard of unfitness based upon a teacher's adverse emotional effect upon students would not be applied to other teachers if the facts warranted such result"²⁹. The Court thus compared Grossman's situation not with teachers who did not undergo sex reassignment surgery, but to the hypothetical group of teachers who would - either by sex reassignment surgery or by other ways - supposedly adversely affect students, stating that it could not be demonstrated that they too would be dismissed.

In *Holloway v. Arthur Andersen*³⁰, in which Ramona Holloway who had been working for Arthur Andersen, an accounting firm, since 1969, was terminated in 1974 after starting a treatment in preparation for anatomical sex change surgery. The same way as Aimee Stephens evoked Title VII of the Civil Rights Act, Holloway argued that the term "sex" in Title VII is synonymous with "gender", and gender would encompass transsexual individuals³¹. Giving the statute its plain meaning, the Court of Appeals concluded that the Congress only had the traditional notions of "sex" in mind, and it also rejected that excluding transsexual individuals from the protection of Title VII would violate the doctrines of due process and equal protection.

26 429 U.S. 897 (U.S. 1976), 471 U.S. 1017 (1985).

27 The case could not reach the Supreme Court since certiorari was denied by 429 U.S. 897 (U.S. 1976).

28 157 N.J. Super. 165 (1978).

29 127 N.J. Super. 13 (1974).

30 566 F.2d 659.

31 *Ibidem*.

The Court of Appeals was faced with the same issue in *Ulane v Eastern Airlines Inc*³², in which the plaintiff Karen Frances Ulane, who had been working at Eastern Airlines since 1968 as a pilot, was fired in 1981, after undergoing sex reassignment surgery. Ulane argued, that her dismissal was a violation of Title VII stating that it is an unlawful employment practice for an employer to discharge any individual because of such individual's sex. The US Court of Appeals categorically denied that Title VII prohibits discrimination against transsexual individuals, taking a positivist approach underlining that legislative history "clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex"³³. Asserting that only Congress can provide that transsexual individuals should enjoy the protection of Title VII, the Court further stated that "until that time" they "decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation"³⁴. The Court of Appeals subsequently concluded that had Ulane been dismissed because she is female, she could have made use of Title VII³⁵, however, since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexual individuals, Ulane's case did not fall under protection of the laws.

At this point in time came the US Supreme Court's groundbreaking ruling in *Price Waterhouse v. Hopkins*³⁶, in which Ann Hopkins, a senior manager at Price Waterhouse, was denied partnership for being not feminine enough. She was described by the partners as "macho" and in order to improve her chances of partnership was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"³⁷. The Court held that when an employer acts on the basis of a sex stereotype, it has acted on the basis of gender, which brings the issue to the scope of Title VII. The Court interpreted Title VII to mean that "gender must be irrelevant to employment decisions", and construed the words "because of" to set off a hypothetical construct in which a certain factor is assumed to be present at the time of the event, and then questioned whether even if that factor had been absent, the event would have transpired in the same way³⁸. The Supreme Court found that gender was a factor in the employment decision at the moment it was made³⁹ and indicated that the only situation this could be allowed is the existence of a bona fide occupational qualification (BFOQ) which would mean that gender is a reasonably necessary qualification to the normal operation of the particular business or enterprise.

Price Waterhouse v. Hopkins "opened the doors for the protection of transsexuals under federal anti-discrimination statutes in courts based upon the "sex stereotype" theory"⁴⁰. By equating "gender" and "sex", the Court demonstrated that anti-discrimination statutes equally protect gender⁴¹.

32 742 F.2d 1081. Similar to Grossman, the Supreme Court denied certiorari in this case 471 U.S. 1017 (1985).

33 742 F.2d 1081.

34 *Ibidem*.

35 On this point the Court of Appeals refers to *Holloway v. Arthur Andersen* (566 F.2d at 664) which specified that although Title VII does not prohibit discrimination against transsexuals, "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII'.

36 490 US 228 (1989).

37 From Justice William J. Brennan's plurality opinion in 490 US 228 (1989).

38 The Court's explanation of what it refers to as the "but-for causation'.

39 Indicating that the Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of", the Supreme Court also points out that Title VII is meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.

40 B. Mestre, "Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law", in *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, 2011, ISBN 978-88-8420-702-9, p.195.

41 *Ibidem*.

This logic was used in *Schwenk v. Hartford*⁴², in which it was decided that sexual assaults against a transgender inmate constituted discrimination on grounds of sex. In *Smith v. City of Salem*⁴³, regarding a firefighter who was dismissed after informing her superiors that she intended to undergo sex-reassignment surgery to live her life in full as female, the Court of Appeals ruled that "discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman".

In *Schroer v. Billington*⁴⁴, a candidate who was first offered a job at the Library of Congress, and later was refused employment after she informed her future employer that she would be undergoing a sex-reassignment surgery. The District Court concluded that "in refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination". In arguing that Diane Schroer was entitled to a *Price Waterhouse*-type claim for sex stereotyping, the Court stated that it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual".

There were also discrimination cases regarding transgender persons in which the claims were not based on Title VII, yet the sex stereotyping theory was still used. One such case is *Glenn v. Brumby*⁴⁵ where the plaintiff claimed that her termination from work due to her transgender identity was a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals concluded that the employer indeed violated the Equal Protection Clause's prohibition of sex-based discrimination when they fired a transgender employee because of her gender non-conformity.

It is against this background that the US Supreme Court is today judging the first transgender discrimination case before it, *R.G. & G.R. Harris Funeral Homes*. The section below breaks down the claims and arguments brought by the parties in this case.

4. *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission (EEOC)*

The question before the Supreme Court in *R.G.&G.R. Harris Funeral Homes Inc. v. EEOC* is "whether Title VII [of the Civil Rights Act of 1964] prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*. In the words of Aimee Stephens' counsel, the case is about "whether when someone fires someone because they are transgender or because they fail to conform to sex-based stereotypes, is that because of sex"⁴⁶?

Aimee Stephens argues that her dismissal constitutes discrimination because of sex for three reasons: According to the first claim, which is based on a *Price Waterhouse*-type claim for sex stereotyp-

42 *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

43 *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

44 *Schroer v. Billington*, 577 F. Supp. 2d 293 (District Court, DC 2008).

45 *Glenn v. Brumby*, No. 10-14833 (11th Cir. 2011).

46 From the submissions of David D. Cole on behalf of Aimee Stephens during the oral arguments before the Supreme Court on October 8, 2019.

ing, by firing her for failing to conform to the company's owner's explicitly stated stereotypes about how men and women should behave, the Funeral Homes discriminated against Stephens in the same way that Price Waterhouse discriminated against Ann Hopkins for failing to walk and talk more femininely. Aimee Stephens argues that "the objection to someone for being transgender is the ultimate sex stereotype"⁴⁷ because it rests on the assumption that if someone is assigned a male sex at birth, that person must live and identify for their entire life as a man.

According to the second claim, which is closely linked to the line in the first claim, the Funeral Homes engaged in disparate treatment on the basis of sex by firing Stephens for contravening a sex-specific expectation that applies only to people assigned a male sex at birth, namely that they live and identify as a man for their entire lives. Accordingly, she was fired for identifying as a woman only because she was assigned a male sex at birth; had she been assigned a female sex at birth, she would not have been fired. This point corresponds to a distinct problem, which anti-discrimination cases involving transgender persons encompass, namely that of identifying the appropriate comparator⁴⁸. In explaining this issue, the counsel of Aimee Stephens gives the hypothetical example in which an employer who had six Aimees, five of whom were assigned female at birth, and one who was assigned male at birth. If the employer fires the one who was assigned male at birth, that person would be fired because of her sex assigned at birth⁴⁹. Thus the comparison is between the person who has transitioned from male to female and with women who have not transitioned. The result reached is that discrimination against a transgender person is treating them differently from others who have the same gender identity, because of the transgender person's sex assigned at birth.

Finally, it is claimed that the Funeral Homes committed sex discrimination for firing Stephens for, in her boss' words, "changing her sex". It is argued that this constitutes discrimination in the same way that firing someone for changing their religion is religious discrimination.

The counter claims in this case came not only from the petitioner, Harris Funeral Homes, but also from the Solicitor General, Noel J. Francisco, who represents the federal government before the Supreme Court. Harris Funeral Homes asserted that sex and transgender status are different concepts, that the definition of sex is trying to be changed, that deciding in favor of Aimee Stephens would destroy all sex specific work requirements (including BFOQs)⁵⁰. The most remarkable claim of the Solicitor General, on the other hand, was that if an employer treats a transgender man exactly the same as you treat a transgender woman, there is no discrimination since they should be the appropriate comparators in such cases. Solicitor General Francisco bases his reasoning upon his interpretation of Price Waterhouse which, he says, states that treating an aggressive woman worse than an aggressive man would be a violation of Title VII because in that case one would be treating similarly situated people differently. This, so-called, "equal misery" argument (claiming there is no discrimination if male and female transsexuals are treated alike) was dismissed as a defense during the oral arguments by Aimee Stephens' counsel as constituting "two acts of sex-discrimination".

The questions of the judges during the hearing reveal the two issues which will be instrumental in deciding the case: the issue of judicial interpretation and the issue of sex specific work requirements. Regarding the interpretation issue, the inevitable discussion is whether including to the scope of Title VII, discrimination against transgender persons would be undermining the democratic legislative process. Regarding this issue, Aimee Stephens has underlined that they do not claim to redefine

47 *Ibidem*.

48 B. Mestre, "Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law", cit., p. 201.

49 From the submissions of David D. Cole on behalf of Aimee Stephens during the oral arguments before the Supreme Court on October 8, 2019.

50 From the submissions of John J. Bursch on behalf of Harris Funeral Homes during the oral arguments before the Supreme Court on October 8, 2019.

"sex". In fact, they take the narrowest definition of the word, and base their claims on "sex assigned at birth" or "biological sex". This is especially apparent in their second claim, namely that she was fired for identifying as a woman only because she was assigned a male sex at birth. The judges suggested during the oral arguments before the Supreme Court that affording a meaning to "sex" which the Congress had not clearly stated could create "massive social upheaval"⁵¹. This worry is clearly unfounded considering the case law of Federal Courts of Appeals, as introduced above, which have been recognizing that discrimination against transgenders constitutes sex discrimination under Title VII. Aimee Stephens' counsel has rightly made this point very clear.

Regarding the issue of sex specific work requirements, the judges made it excessively clear that they are very concerned about the implications a positive decision could have on bathroom policies and dress codes of companies. Throughout the oral arguments before the Supreme Court, the judges numerous times interrupted the counsel of Stephens to ask about his thoughts on the possible implications of the judgment in the current case on bathroom policies. The counsel just as many times explained that the bathroom policies are not the issue in the present case, however judges kept coming back to this issue stressing that the issue is inevitable should they decide in favor of Stephens. How the judgment in the present case might affect dress codes was also brought various times by the judges to the forefront of discussions. Regarding this point, however, the counsel for Stephens has not held back and did in fact use it as an argument supporting the existence of discrimination. Based on established Case Law of the Supreme Court⁵², Stephens argues that since discrimination is not just to differentiate but to differentiate in a way that injures, one should ask whether a reasonable person in her position experiences significant or trivial harm. Since for transgender persons dressing contrary to their gender identity would constitute significant harm, forcing them to do so would constitute a violation of Title VII because of sex⁵³.

5. The EU Approach for the Protection of Transgender Persons

Having assessed the US approach towards transgender protection and the issues being debated at the Supreme Court in the current case before it, this paper now turns to the situation in the EU. Article 21(1) of the Charter of Fundamental Rights, which has the same status as the EU Treaties⁵⁴, yet which is binding on EU Member States only when they are implementing Union Law⁵⁵, states that "any discrimination based on any ground such as sex [...] or sexual orientation shall be prohibited." This non-exhaustive list of discrimination grounds has left out any specific reference to gender identity. Among the Directives enacted in accordance with Article 19 TFEU⁵⁶, the one relating to employment conditions, namely the Framework Employment Directive 2000/78⁵⁷ also prohibits discrimination on the

51 Justice Neil Gorsuch during the oral arguments before the Supreme Court on October 8, 2019.

52 *Burlington Northern & Santa Fe Railway Co. v. White*, 548 US 53 (2006).

53 From the submissions of David D. Cole on behalf of Aimee Stephens during the oral arguments before the Supreme Court on October 8, 2019.

54 TEU Article 6(1).

55 Charter of Fundamental Rights of the European Union, Article 51(1).

56 TFEU Article 19(1): "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

57 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

grounds of, among others, sexual orientation⁵⁸ in (access to) employment and working conditions, including dismissals and pay⁵⁹. Despite the "impressive constitutional framework for EU anti-discrimination law"⁶⁰ which currently does protect against some aspects of sexual orientation discrimination⁶¹, transgender individuals are not explicitly protected under European Union legislation.

When, in 1996, the European Court of Justice was faced for the first time with a dismissal case involving a transgender person, EU law was not as developed as it is now regarding anti-discrimination. The only legislation at the Court's disposal was Council Directive 76/207 on the equal treatment for men and women as regards employment⁶². This Directive, which is since repealed⁶³, had as its purpose to put into effect the principle of equal treatment, for men and women as regards access to employment, including promotion and as regards working conditions⁶⁴. The Directive defines the principle of equal treatment to mean that there shall be no discrimination whatsoever on grounds of sex directly or indirectly by reference in particular to marital or family status⁶⁵. It was made clear that working conditions also include conditions governing dismissal and that men and women shall be guaranteed the same conditions without discrimination on grounds of sex⁶⁶.

At the time, English law contained even more limited provisions regarding discrimination at the workplace. The relevant piece of national legislation was the Sex Discrimination Act of 1975, which prohibited as direct sex discrimination, treating a woman less favorably than a man on the ground of her sex⁶⁷. So in 1993, when the case of dismissal of P. came before it, the Truro Industrial Tribunal considered that the English law provided no helpful answer in identifying discrimination, yet suspected that Directive 76/207 could allow a broader interpretation covering discrimination against transgender persons as well⁶⁸. It is against this background that the case of P. found its way to the ECJ for preliminary ruling. P. was dismissed from the educational establishment, operated by Cornwall County Council where she was working as a manager, on account of gender reassignment.

6. *P. v S. and Cornwall County Council*

The questions referred to the court by the national tribunal⁶⁹ were whether the dismissal of a transsexual person for a reason related to a gender reassignment constituted a breach of Directive 76/207; and whether Article 3 of this Directive, which referred to discrimination on grounds of sex, prohibited treatment of an employee on grounds of the employee's transsexual state. Below, the reasoning of the Advocate General as well as of the Judgment in this case, which was the first case law in the world

58 Council Directive 2000/78 Article 1.

59 *Ibidem*, Article 3(1).

60 P. Craig, Gráinne de Búrca, *EU Law: Texts, Cases, and Materials*, 2015, ISBN 978-0-19-871492-7, p.893.

61 Protection at EU level is incomplete due to the Horizontal Anti-Discrimination Directive being stuck in Council.

62 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

63 Repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

64 Council Directive 76/207 Article 1.

65 *Ibidem*, Article 2(1).

66 *Ibidem*, Article 5(1).

67 Sex Discrimination Act Section 1(a).

68 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 7.

69 The European Court of Justice has considered the two questions together in Case C-13/94, paragraph 13.

preventing discrimination because a person is transgender⁷⁰ will be analyzed.

In his Opinion, Advocate General Tesauro identifies the core of the issue as determining whether the unfavorable treatment of transgender persons constituted discrimination on grounds of sex, while it was indisputable that the wording of the principle of equal treatment in Directive 76/207 refers to the traditional man/woman dichotomy⁷¹. The Advocate General, then presents us with two alternate paths that could be followed in resolving this issue. The first one brings forth the questioning of the validity of the man/woman dichotomy in the face of scientific progress compelling us to go beyond the traditional classification, and reminds us that in addition to the man/woman dichotomy, there is a "range of characteristics, behavior and roles shared by men and women, so that sex itself ought rather be thought of as a continuum"⁷². Tesauro identifies the inevitable consequence of this line of reasoning as being the redefinition of sex, which he considers to merit a "deeper consideration in more appropriate circles"⁷³ and therefore proposes against taking this path. Even so, he firmly rejects an approach that would deny protection to those who are discriminated against merely because they fall outside the traditional man/woman classification. Thus, the path that Advocate General Tesauro proposes is one that builds on the premise that P. would not have been dismissed if she had remained a man. Thereby, he argues that "where unfavorable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex, or on grounds of sex"⁷⁴. By equating "change of sex" to "sex", the Advocate General brings the dismissal into the realm of Directive 76/207. He strengthens his premise by asserting that "the prohibition of discrimination on grounds of sex is an aspect of the principle of equality"⁷⁵. By doing this, Advocate General Tesauro interprets the prohibition of discrimination in the light of the principle of equality, which is a fundamental human right whose observance the court ensures⁷⁶. So, Tesauro concludes on this point that maintaining "that the unfavorable treatment suffered by P. was not on grounds of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality"⁷⁷. It is this reading together of prohibition of discrimination with the principle of equality that compels an interpretation of the Directive which precludes the dismissal of a transsexual person on account of a change of sex⁷⁸.

Regarding concerns about judicial interpretation, Tesauro points out that the Directive dates from 1976, and took account of "what may be defined as normal reality at the time of its adoption"⁷⁹. He therefore pleads for construing the Directive in a broader perspective, which would include all situations in which sex appears as a discriminatory factor.

Tesauro also dismisses the "equal misery" argument, which had been put forth on several occasions during the proceedings, namely that there can be no sex discrimination if trans women are not treated differently than trans men, since both are treated unfavorably. In explaining the "equal misery" argument, the Advocate General makes references to US Case law in which this argument was

70 S. Whittle, 'Employment Discrimination and Transsexual People', Gender Identity Research and Education Society (gires) Report, 01.09.2014, <https://www.gires.org.uk/employment-discrimination-and-trans-people/>

71 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 16.

72 *Ibidem*, Paragraph 17.

73 *Ibidem*, Paragraph 17.

74 *Ibidem*, Paragraph 18.

75 *Ibidem*, Paragraph 19.

76 B. Mestre, 'Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law', cit., p.197.

77 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 20.

78 *Ibidem*, Paragraph 25.

79 *Ibidem*, Paragraph 23.

used to support the position that dismissing a transgender person was lawful⁸⁰. He holds that the comparison should be between the person who has transitioned from male to female and a male person who has not made a transition and "remained a man"⁸¹.

The "equal misery" argument, brought by the UK government in support of their argument as to the dismissal falling outside the Discrimination, is rejected by the ECJ in the judgment too. The ECJ does so by adopting the same comparator as Tesauro did across those who have been treated unfavorably due to gender reassignment, namely the "persons of the sex to which he or she was deemed to belong before undergoing gender reassignment"⁸². The Court uses this argument to establish that dismissing a person on the ground that "he or she intends to undergo, or has undergone, gender reassignment" is a discrimination based on the sex of the person concerned. It follows that the Court "does not seem to distinguish between sex and gender"⁸³ since had a person not undergone gender reassignment, he or she would not have suffered discrimination.

Also following the lead of the Advocate General, the Court defined Directive 76/207 as simply being the expression of the principle of equality, which is one of the fundamental principles of Community law⁸⁴. The Court went one step further and in concluding that the dismissal of P. must be regarded as discrimination based on sex, it proclaimed that "to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard"⁸⁵.

7. Inspirations from the *P. v. S.* Judgment for the Supreme Court

The section above reveals that in the *P. v. S.* case, the ECJ dealt with a similar set of issues as those currently before the Supreme Court. In this section, the focus is on these similarities and on whether and to what extent ECJ's line has foundation in the US case law, with a view to providing inspiration for the US Supreme Court in the case *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*.

The reading of the ECJ of the prohibition of discrimination in relation to and as an expression of the principle of equality, is one of the most novel aspects of its judgment in *P. v. S.* By doing so, the ECJ has anchored the prohibition of discrimination on grounds of sex in Directive 76/207 to a fundamental human right at the core of the EU from the very beginning⁸⁶. Doing so meant that the ECJ rendered the prohibition of discrimination a place which is hierarchically above other employment related issues, such as sex specific work requirements. This approach does in fact have the necessary foothold under the US case law as well. The US Supreme Court has drawn on the Equal Protection Clause in a number of LGBTI+ related cases, as explained above⁸⁷. Similarly, courts at other levels ruled that firing a transgender employee due to their gender non-conformity constituted a violation of

80 The Advocate General makes references to, among others, *Grossman v Bernards Township Board of Education*, *Ulane v Eastern Airlines* and *Holloway v Arthur Anderson* as introduced above.

81 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, cit., Paragraph 18.

82 Case C-13/94, 30.04.1996, Judgment of the Court, paragraph 21.

83 Bruno Mestre, "Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law", cit., p.198.

84 Case C-13/94, 30.04.1996, Judgment of the Court, paragraph 18.

85 *Ibidem*, paragraph 22.

86 Article 2 TEU.

87 *Romer v. Evans*; *Lawrence v. Texas*; *United States v. Windsor*; *Obergefell v. Hodges*.

the Equal Protection Clause⁸⁸. By following the ECJ's lead and making anti-discrimination a reflection of a constitutional principle, the Supreme Court would be answering the concerns, some of which voiced by the judges of the Supreme Court themselves, regarding bathroom policies and dress codes. This point is supported by US Supreme Court's own case law in *Price Waterhouse v. Hopkins* by establishing that the only situation where gender can be allowed to be a factor in an employment decision would be the existence of a bona fide occupational qualification, which bathroom policies and dress codes do not form a part of.

In bringing the discrimination of a transgender employee into the scope of Directive 76/207, and thus deciding that the discrimination of a transgender person is "because of sex" the ECJ equated the discrimination grounds of "change of sex" to "sex", in the Advocate General's opinion, or the discrimination on the ground of "gender reassignment" to discrimination based on "sex", in the ECJ's judgment. Thereby, the ECJ equated sex to gender, which is also in line with the Supreme Court's earlier case law⁸⁹, which is already used in discrimination cases involving transgender persons at various levels of the US courts⁹⁰. This line of reasoning would disqualify the claims of the Harris Funeral Homes as well as the concerns of some judges regarding the issue of judicial interpretation. Indeed, this approach leaves out the discussion as to whether the meaning of "sex" is being changed. It is, nevertheless, useful to remember the reasoning of Advocate General Tesauro in adopting a broader perspective of interpretation based on the changing norms since the adoption of the legislation in question, and his plea to include all situations in which sex appears as a discriminatory factor.

In reaching this outcome that discrimination based on gender reassignment falls under "sex", the ECJ adopts a different comparator than the US courts have. The ECJ looks at the situation of a person who intends to undergo, or has undergone, gender reassignment in comparison to the situation of persons of the sex to which that person was deemed to belong before undergoing gender reassignment. This approach of the Court fundamentally disregarded claimant's self-identification as female by saying, in essence, that "P. was a man who was treated discriminatorily because he failed to satisfy society's expectations for men"⁹¹. On the other hand, the US courts, as well as Aimee Stephens's counsel before the Supreme Court, compare the situation of female employees based on whether they have transitioned from male or born female. The distinction between these two approaches does not seem to be very central to the result when one remembers the court in *Schroer v. Billington* stating that it does not matter "for purposes of Title VII liability whether the [employer] withdrew its offer of employment because it perceived [the employee] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."

It follows that while the focal point for the EU Court was equality, and thereby respect to dignity and freedom, for the US Court system, it has been "sex stereotyping". While this concept has been very instrumental in affording protection to transgender persons, it also comes with a drawback relating to the setting aside of the self-identification of the claimant for the purpose of holding that transgender persons should be afforded protection because they have not fitted into the stereotypes that applied to their sex at birth. The ideal solution would be to protect transgender persons from discrimination based on the sole fact that it is their fundamental human right. This would prevent victimization by having to confront and utilize their sex at birth, just so they can be protected against dismissal based on their gender.

This being said, the choices of comparator of both legal systems easily refute the "equal misery"

88 *Glenn v. Brumby*.

89 *Price Waterhouse v. Hopkins*.

90 *Schwenk v. Hartford; Smith v. City of Salem*.

91 M. van den Brink, P. Dunne, *Trans and Intersex Equality Rights in Europe – a Comparative Analysis*, (European Commission, 2018), ISBN 978-92-79-95766-6, p. 47.

claims. These claims are based on a comparison between transgender men and transgender women; and they find no discrimination if these two groups would be treated the same. Since both courts have approached the issue by comparing the transgender individuals either to those belonging to the declared sex of the claimant or to those who are of the claimant's birth sex, the "equal misery" argument is thereby rejected with not much effort.

8. Conclusion

Transgender persons face a plethora of challenges, discrimination, stigmatization and hate crimes at their workplace⁹². To bring transgender persons closer to enjoying the same protection as offered to the general population, human rights and LGBTI+ advocates as well as courts have resorted to various theories and arguments, the most important of which have been underlined in this paper. Courts at various levels in the US have already taken some important steps towards Transgender protection. The approach of US courts, in most issues, are not much different than the ECJ's approach, as this paper has highlighted. On some fundamental issues, though, the EU Court has taken more radical steps. It is on these issues that the ECJ case law could complement the US courts' approach.

This paper argues that anchoring the judgment on the principle of equality - which various US courts have done so far already in cases involving transgender persons - would eliminate many of the policy issues, such as bathroom policies, which seem to be hijacking the entire debate. The principle of equality could be used in combination with the sex stereotyping argument, which is the subject of the question brought before the Supreme Court. It would not eliminate, rather supplement and strengthen the sex stereotype argument.

Recognizing that discrimination of transgender persons at the workplace is "because of sex" has sufficient groundwork in US case law. The ECJ also offers inspiration towards the same outcome. Whether by taking "sex" to mean "gender" or by equating it to "change of sex" or other gender identity realities, the courts have so far protected fundamental rights of transgender persons without having to "change the meaning of sex" as suggested by opponents. This path is taken by the ECJ as well as various courts in the US system regarding discrimination cases relating to transgender persons.

The Supreme Court's decision in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* could bring the entire transgender community in the US one step closer to meaningful legal protection against discrimination, should the Supreme Court follow these earlier examples. In this regard, it is appropriate to close off with a plea in Advocate General Tesauro's words from decades ago in his opinion in *P. v. S.*:

"Finally, I am well aware that I am asking the Court to make a "courageous" decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person's sex with regard to the rules regulating relations in society. Whosoever believes in that value cannot accept the idea that a law should permit a person to be dismissed because she is a woman, or because he is a man, or because he or she changes from one of the two sexes (whichever it may be) to the other by means of an operation which - according to current medical knowledge - is the only remedy capable of bringing body and mind into harmony. Any other solution would sound like a moral condemnation - a condemnation, moreover, out of step with the times - of

⁹² ILO, *Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work*, (ILO, 2015); K. Sidiropoulou, *Gender Identity Minorities and Workplace Legislation in Europe*, (Global Labor Organization Discussion Paper, 2019).

transsexuality, precisely when scientific advances and social change in this area are opening a perspective on the problem which certainly transcends the moral one....Consequently, I consider that it would be a shame to miss this opportunity of leaving a mark of undeniable civil substance, by taking a decision which is bold but fair and legally correct, inasmuch it is undeniably based on and consonant with the great value of equality".