

INTRODUCTION

Legal discourse is a manifestation of the will of the sovereign, which in democratic political communities, represents the agglomeration of the majority.¹ Within the plurality of discourses that seek to become dominant legal discourses, we have the identity discourse and its objective of influencing the legal system.² When we refer to gender identity,³ we are not referring to a person's sexual desire or attraction,⁴ but to the subject's self-perception.⁵ Also, we refer to the coincidence or divergence between the perception that he or she has of himself or herself and the identity that society, his or her parents or his or her doctors, have attributed to him or her.⁶ In particular, we are speaking about the transgender concept.⁷ We are alluding to the general conceptualization that is

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¹ See Le Cheng & Marcel Danesi, *Exploring legal discourse: a sociosemiotic (re)construction*, SOCIAL SEMIOTICS, 29:3, 279-285, DOI: 10.1080/10350330.2019.1587841 (2019); See Joel A. Cosme Morales, *Alternativas a la mayoría simple: ¿balotaje o voto preferencial?*, IN REV, (February 4, 2021) <http://revistajuridica.uprrp.edu/inrev/index.php/2021/02/04/alternativas-a-la-mayoria-simple-balotaje-o-voto-preferencial/#easy-footnote-3-2717>

² See FRANCIS FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT (2018).

³ See Frank C. Torres Viada, *Una Mirada a la Igualdad de Género: Modelos y Acercamientos Teóricos al Interior de Nuestro Tribunal Supremo*, 36 Rev. Jur. U.I.P.R. 673 (2002). (For Frank C. Torres Viada, gender is a theoretical construction articulated with the purpose of explaining the postulate of the feminist movement insofar as sexual difference does not imply inferiority. He distinguishes the concept of gender from the concept of sex, since he understands that sex refers to differences, usually physiological and anatomical, between men and women, determined by biological factors. He expresses this author that it could be asserted that to some extent, gender is socially constructed sex).

⁴ According to U.S. Department of Labor's Office of Federal Contract Compliance Programs, sexual orientation "refers to an individual's physical, romantic, and/or emotional attraction to people of the same and/or different gender. Examples of sexual orientations include straight (or heterosexual), lesbian, gay, and bisexual".

U.S. DEPARTMENT OF LABOR'S OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Frequently Asked Questions Sexual Orientation and Gender Identity*, (December 3, 2014), <https://www.dol.gov/agencies/ofccp/faqs/lgbt#Q19>.

For the Anti-Discrimination Law of Puerto Rico, sexual orientation means:

[T]he ability of any person of having an emotional, affectional, or sexual attachment to persons of the other gender, the same gender, or more than one gender. In order to accomplish all the purposes provided herein, this definition shall be interpreted as broadly as possible to extend the benefits thereof to any citizen who is a victim of discrimination, whether it is a one-time event or a pattern.

Anti-Discrimination Law of Puerto Rico, Law No. 100 of June 30, 1959, 29 LPRA § 151 (2017).

⁵ For the Anti-Discrimination Law of Puerto Rico, sexual orientation means:

[T]he manner in which an individual identifies or recognizes him/herself in relation to his/her gender, with or without regard to the individual's designated sex at birth. In order to accomplish all the purposes provided herein, this definition shall be interpreted, as broadly as possible to extend the benefits thereof to any citizen who is a victim of discrimination, whether it is a one-time event or a pattern, and in accordance with the provisions of Public Law No. 111-84 (2009), the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

Id.

⁶ *Id.*

⁷ According to the DSM-5, gender dysphoria is:

used to describe people whose gender identity or gender expression differs from that associated with their birth sex.⁸ Therefore, we have that anyone whose identity, appearance or behavior is outside the conventional gender norms can be classified as transgender.⁹ The aim of this article is not to discuss the biological, philosophical or political aspects of the term. We want to concentrate this brief space to discuss the impact of *Arroyo v. Rosselló* in labor law and legislation inclined to protect the female sex in work.¹⁰

For this reason, we must ask ourselves the following: what happens when a person who can biologically give birth, but who is registered as a man in the Demographic Registry, wants the labor maternity benefits? What happens when a person, who was born with a penis and is registered in the Demographic Registry as a woman, decides to adopt and wants to qualify for maternity benefits?¹¹ These are some of the questions we want to answer according to the applicable precedents of Puerto Rico and the United States.

As we know, Puerto Rican labor law has developed legislation that protects women.¹² However, what it is to be a woman is not defined explicitly in legal terms, thus creating a window for multiple interpretations.¹³ In particular, we will analyze the following jurisprudence and its

[A] marked incongruity between the sex that one feels or expresses and the one assigned to him, of a minimum duration of six months manifested by a minimum of two of the following characteristics:

1. A marked incongruity between the sex one feels or expresses and his or her primary or secondary sexual characteristics (or in young adolescents, the expected secondary sexual characteristics).
2. A strong desire to detach oneself from one's primary or secondary sexual characteristics, due to a marked incongruity with the sex that is felt or expressed (or in young adolescents, a desire to prevent the development of the anticipated secondary sexual characteristics).
3. A strong desire to possess the sexual characteristics, both primary and secondary, corresponding to the opposite sex.
4. A strong desire to be of the other sex (or an alternate sex other than the one assigned to you).
5. A strong desire to be treated as the other sex (or an alternate sex other than the one assigned to you).
6. A strong conviction that one has the typical feelings and reactions of the other sex (or an alternative sex other than the one assigned to him).

AMERICAN PSYCHIATRIC ASSOCIATION, GUÍA DE CONSULTA DE LOS CRITERIOS DIAGNÓSTICOS DEL DSM-5, 240 (2014) (translation supplied).

⁸ *Id.*

⁹ According to Andrew N. Sharpe:

[T]he term 'transgender' has come increasingly to function as an umbrella term for a range of trans-subjectivities including people who identify as transsexual and who seek or have undertaken sex (genital) reassignment surgery, people seeking other surgical procedures and/or hormonal treatments, and people whose permanent or temporary gender crossings are unaccompanied by medical intervention.

ANDREW N. SHARPE, *TRANSSEXUAL JURISPRUDENCE, DYSPHORIC BODIES OF LAW* 1 (2002).

¹⁰ *Arroyo González v. Rosselló Nevares*, 305 F. Supp. 3d 327 (2018).

¹¹ See PRIMERA HORA, *Pareja trans celebra el nacimiento de su bebé en Puerto Rico*, (July 20, 2020), <https://www.primerahora.com/noticias/puerto-rico/notas/pareja-trans-celebra-el-nacimiento-de-su-bebe-en-puerto-rico/>.

¹² See Working mothers' protection, Act No. 3 of March 13, 1942, 29 LPRC §§ 467-474 (2017); Regulate the Period to Breastfeed or to Express Breast Milk, Act No. 427 of December 16, 2000, 29 LPRC §§ 478-478h (2017); Working Women's Bill of Rights, Act No. 9 of January 3, 2020, 29 LPRC §§ 510I-510 (2020).

¹³ Cf. H.R. 764, 19th Leg., 1st Gen. Assemb. (2021), <https://aldia.microjuris.com/wp-content/uploads/2021/05/PC0764.pdf>. (The bill defines sex as "[t]he biological state of being male or female based on chromosomes, the natural level of endogenous sex hormones, and the sexual organs with which one is born." (translation supplied)).

relationship with sex and gender: *Andino Torres, Ex parte*; ¹⁴ *Delgado Hernández, Ex parte*; ¹⁵ *AAR, Ex parte*; ¹⁶ *Arroyo v. Rosselló*, ¹⁷ and, *Bostock v. Clayton County*.¹⁸ Then, we will discuss the *Working mothers' protection Act*¹⁹ and the *Regulate the Period to Breastfeed or to Express Breast Milk Act*²⁰ and its pertinent jurisprudence, to finally express the different and possible interpretations in light of the possibility of gender change.

I. GENDER IN JURISPRUDENCE

A. THE SUPREME COURT OF PUERTO RICO

i. *ANDINO TORRES, EX PARTE*

Andino Torres, Ex parte is the first case in the Supreme Court of Puerto Rico that deals with a sex change in the Demographic Registry of Puerto Rico.²¹ In 1976, the petitioner underwent a sex reassignment operation.²² Since then, she conducted herself and behaved like a woman, but her certificate indicated that her name was Andrés Andino Torres and that her sex was male.²³ The Court of First Instance, through a judgment of December 17, 1996, ordered the Demographic Registry²⁴ to change its name to Andino Torres, but denied the request for a sex change on the grounds that it was not permitted by the Demographic Registry Law.²⁵ Circuit Court of Appeals confirms the primary forum judgment.²⁶ The Supreme Court revokes the lower forums, but does not issue an opinion, just a judgment.²⁷ Therefore, this determination only applied to the part of the case and could not be extended to the rest of the people in the same situation.²⁸ As the Supreme Court itself expressed in an opinion:

It shall not be appropriate to cite, as an authority or as a precedent, judgments that are not Court opinions. A judgment without a Court opinion, the

¹⁴ *Ex parte Andino Torres*, 151 DPR 794 (2000).

¹⁵ *Alexis Delgado Hernández, Ex parte*, 165 DPR 170 (2005).

¹⁶ *AAR, Ex parte*, 187 DPR 835 (2013).

¹⁷ *Arroyo v. Rosselló*, 305 F. Supp. 3d 327 (2018).

¹⁸ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

¹⁹ *Working mothers' protection*, Act No. 3 of March 13, 1942, 29 LPRA §§ 467-474 (2017).

²⁰ *Regulate the Period to Breastfeed or to Express Breast Milk*, Act No. 427 of December 16, 2000, 29 LPRA §§ 478-478h (2017).

²¹ *Ex parte Andino Torres*, 151 DPR 794 (2000).

²² See Pedro F. Silva-Ruiz, *Derecho de Familia: Transcendentales sentencias sobre el transexualismo y las capitulaciones matrimoniales*, 70 REV. JUR. UPR 409 (2001)

²³ *Ex parte Andino Torres*, 151 DPR 794, 812 (2000).

²⁴ *Puerto Rico Demographic Registry Act*, Act No. 24 of April 22, 1931, 24 LPRA §§ 1041-1325 (2020).

²⁵ *Ex parte Andino Torres*, 151 DPR 794 (2000).

²⁶ *Id.* on p. 813.

²⁷ For a distinction between the two concepts, see *Rivera Maldonado v. E.L.A.*, 119 D.P.R. 74, 79-80 (1987); *Delgado Hernández, Ex Parte*, 165 DPR 170, 182 (2005).

²⁸ Supreme Court of Puerto Rico Rules provide that:

Given that the unpublished judgments will not be accessible to the general public, it will be considered improper to cite as authority or precedent before any forum a decision of this court that has not been issued by opinion or that has not been published by the Bar Association or by the court itself.

4A L.P.R.A. Ap. XXI-B, Rule 44.

publication of which has not been ordered by the Court, but which has been published because one of the justices has certified a concurring, dissenting or separate opinion, has no precedential value; it only has the intrinsic persuasive value of its rationale.²⁹

Despite this, for illustrative purposes of the development of the rights of transgender people, this ruling is extremely valuable. In support of this judgment, Associate Justice Negrón García, who was joined by Associate Justices Hernández Denton and Fuster Berlingeri, subscribes a concurring opinion. Concurring opinion begins with equity.³⁰ Associate Justice Negrón states that the Courts have found solutions to problems not foreseen by the legislator and, what is more, absolutely unpredictable.³¹ He clarifies that he is not facing the recognition of a constitutional right to change sex. Then he mentions that “[a]s a scientific and legal reality, the right to undergo surgical intervention to alter the sexual organs of the opposite sex is recognized”.³² The Associate Justice summarizes the controversy in simple terms: this case deals with the power of the courts to amend the Demographic Registry to match the registry reality with the human extra-registry.³³ Explains that in the Demographic Registry there are examples of changes admitted to the birth certificate to record certain post-natal events that occurred during a person's history, the most common being the change of name, either by adoption, or by the will of the person. Later he begins to analyze the right to human dignity.³⁴ He expounds the following:

Dignity encompasses the most intimate safeguards of the personality. It is a *sine qua non* requirement of self-respect, the most precious asset of the moral person. If, for reasons that sometimes escape conventional understanding, a human being seeks to integrate his psyche - through a difficult, painful, traumatic, but absolutely legal chemical and surgical process - to a physical aspect that he considers disgusting, it is a lack of understanding of their condition, respect for their decision and charity towards their suffering, denying recognition to the resulting physical and social reality. Because a morphological change in the genetic apparatus does not occur in the secret of the mind, but in everyday social advertising.³⁵

He later analyze the right to privacy and give as an example an application for employment.³⁶ In this regard, we know that almost every job application requires the presentation of a birth certificate.³⁷ Negrón García points out that for a person whose appearance and behavior make up a certain sex, the presentation of said certificate would invite impertinent questions about their ability to perform their job.³⁸ Consequently, these questions would violate the most intimate

²⁹ *Rivera Maldonado v. ELA*, 119 DPR 74, 80 (1987).

³⁰ Cód. Civ. PR art. 7, 31 LPRA § 7 (2015 & Supl. 2020) (repealed 2020).

³¹ *Andino Torres, Ex parte*, 151 DPR 794, 803 (2000).

³² *Id.* p. 797.

³³ *Id.* p. 798.

³⁴ *Id.*

³⁵ *Id.* p. 807.

³⁶ *Id.* p. 810.

³⁷ *Id.*

³⁸ *Id.*

sphere of his being and, in their effects, harmful to his chosen social projection.³⁹ The Justice Negrón states that a mere file of *ad perpetuam rei memoriam* is not enough to correct this interference, since it does not alter the official certification of sex and, therefore, forces the transsexual to disclose information that, otherwise, would not be required.⁴⁰ It concludes that the effects, given the social prejudices in which it is not necessary to abound, would be catastrophic for the person affected.⁴¹

Now, as we know, this decision was not without dissent. The first dissenting Opinion was issued by Associate Justice Rebollo López, which is joined by Chief Justice Andréu García. Justice Rebollo begins with the following warning: the Court jurisprudently opens the way and lays the foundations so that in Puerto Rico two people of the same sex, one of them transsexual, can marry each other.⁴² He explains that this is the inescapable legal consequence of the majority's decision because “based on a mere assertion that she feels like a woman” and the later “surgical intervention that did not change the sex of the person as such, the Court converts Andrés Andino Torres in a woman *for all legal purposes*, this person being able to marry, as a woman, since her marriage certificate so officially establishes it”.⁴³ For Rebollo, the legislator did not expose the change of sex as a legislative intention, so the courts cannot act as if it had been done. His analysis denies the existence of a loophole in the Demographic Registry Law, and consequently, argues for the inapplicability of equity in this case.⁴⁴ He also states that the Demographic Registry law is a “strict statute” in what has to do with changes to the original document once registered.⁴⁵

Associate Justice Corrada Del Río also issued a dissenting opinion. Among the fundamentals of their dissent is the one that understands that a sex change surgery is a merely cosmetic surgery that does not produce any alteration in the chromosomal endowment of the operated, “so that as a scientific and real question, there is no sex change”.⁴⁶ For the Associate Justice, the fact that a transsexual undergoes sex change surgery can lead to a contrast between the external genital elements and the chromosomal and hormonal sex.⁴⁷ However, he adds that to determine the sex of a person who underwent a sex change surgery, it is not enough to look to their physique, since it is also necessary to evaluate their chromosomal, hormonal, genetic and psychological characteristics.⁴⁸ He concludes that the psychological and emotional aspect of a

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* p. 810.

⁴² Fifteen years later it would be the Supreme Court of the United States itself that would allow the right to marriage between people of the same sex. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴³ *Andino Torres, Ex parte*, 151 DPR 794, 811 (2000) (emphasis added).

⁴⁴ *Id.* p. 822.

⁴⁵ *Id.*

⁴⁶ *Id.* p. 828.

⁴⁷ *Id.* p. 834.

⁴⁸ *Id.* p. 834-835. He further states:

A male operated on is still male by extirpation and suppression of primary sexual characteristics. Nor does it stop being so, because it presents sexual organs similar to those of the female, as well as the psychic and emotional characteristics of said sex. The artificial vagina resulting from sex change surgery is merely feminine in appearance; it is not functional for reproductive purposes. Regarding secondary characteristics, there is no real sex change either, but rather an artificial one, since female hormone treatments are prolonged and, if they are suspended, it is very likely that the secondary physical characteristics of the male sex will reappear.

human being does not alter the chromosomal and genetic components that determine sex.⁴⁹ He also understands that sex is a quality of the person so that when one who was born male assumes a female role, it is merely a particular way of living his own sexuality, therefore, when he undergoes a sex change operation, only you will get a simple sex change look.⁵⁰ He ends by stating that in the case of a purely cosmetic surgery, his genetic characteristics will continue to be those of a male.⁵¹

ii. *DELGADO HERNÁNDEZ, EX PARTE*

On this second occasion that the Supreme Court addresses a matter of sex change in the Demographic Registry, unlike the case of Andino Torres, an opinion is issued that establishes a precedent.⁵² In this case, the composition of the Supreme Court was different and, consequently, the result.⁵³ Basically, the facts are summarized as follows: a person who, having been born male, undergoes sex reassignment surgery and requests that his birth certificate and driver's license be corrected so that they correctly reflect his sexual identity.⁵⁴ The Supreme Court Opinion is written by Justice Rodríguez Rodríguez. Interestingly, Justice Hernández Denton changed his position and voted in favor of not changing the sex in the Demographic Registry.⁵⁵ The legal analysis of the opinion begins by highlighting that *Andino Torres, Ex parte*, is a judgment in which the change of sex - from male to female - was authorized in the petitioner's birth certificate who was transsexual and that said decision was not it was a precedent that would oblige the Supreme Court of Puerto Rico.⁵⁶

The majority of the Supreme Court of Puerto Rico explains that the birth certificate is the document that reflects the vital data of the person at the time of birth and is therefore a historical X-ray of the person at birth, which records the following information: date and place of birth, parents' names, name and sex of the person registered.⁵⁷ The records of the registry are subject to amendment only, exceptionally.⁵⁸ Based mainly on the foregoing, the majority of the Court emphasizes that:

[W]e are of the criterion that corresponds to the Legislative Assembly to weigh all the interests involved in the controversy that reveals the issue of transsexuality, to conjure them, and to propose the legislative response that is deemed appropriate. Ultimately, under a system of separation of powers such as

Id. p. 839-840.

⁴⁹ *Id.* p. 841.

⁵⁰ *Id.*

⁵¹ *Id.* p. 842.

⁵² See Hiram A. Meléndez Juarbe, *Derecho Constitucional*, 75 REV. JUR. UPR 29 (2006)

⁵³ In *Andino Torres, Ex Parte* the judges were: Chief Justice Andréu García, Associate Justice Negrón García, Associate Justice Hernández Denton, Associate Justice Fuster Berlingeri; Associate Justice Naveira de Rodón, Associate Justice Rebollo López and Associate Justice Corrada del Río. On the other hand, the judges in *Delgado Hernández, Ex Parte* were: the Chief Justice, Hernández Denton, the Associate Judges, Rodríguez Rodríguez, Rebollo López, Fiol Matta, Rodríguez Rodríguez, Rivera Pérez and Fuster Berlingeri.

⁵⁴ *Delgado Hernández, Ex Parte*, 165 DPR 170 (2005).

⁵⁵ *Id.*

⁵⁶ *Id.* p. 182.

⁵⁷ *Id.* p. 184.

⁵⁸ *Id.* p. 187.

that established in our Constitution, the power to approve laws belongs to the Legislative Assembly and corresponds to the Judicial Power, then, the responsibility of resolving disputes through the interpretation of the approved law.

Given the foregoing, we resolve that it is not appropriate to authorize the requested change in the petitioner's birth certificate to change her sex, since the Demographic Registry Law does not expressly authorize it.⁵⁹

Associate Justice Rivera Pérez issued an Opinion of Conformity. He begins by outlining that there is no doubt about the right of every person to express and live their sexuality in the way they deem appropriate, within the scope protected by the constitutional right to privacy, but that such wishes cannot transcend and disrupt the formality and officiality of the documents issued by the Government.⁶⁰ He writes that to determine the sex of a person who has undergone surgery, it is not enough to listen to the outside of his body, but it is also necessary to evaluate their chromosomal, genetic, hormonal and psychological characteristics.⁶¹ He goes on to explain that the psychological and emotional aspect of a human being does not alter the chromosomal, hormonal and genetic components that determine sex.⁶² He highlights that sex is a quality of the person and that when a person, who was born male, pretends to assume a female role, it is merely a particular way of living his own sexuality, so when a person undergoes a surgical intervention, such as in the present case, he only obtains a simple external appearance of change in the area of his genitalia, as long as the contrary is not demonstrated by expert and scientific evidence.⁶³

Associate Justice Fuster Berlingeri issued a dissenting opinion. Fuster Berlingeri begins by noting that the majority of the Court now relies on a mere managerial policy of the Forum, that is, on the provincial distinction between a judgment and an opinion, to resolve the present case in a manner contrary to what it decided in *Andino Torres, Ex parte*.⁶⁴ “The majority of the Court does not seem to realize that if this Forum or any other can decide essentially identical cases in disparate ways, then the Law does not prevail, arbitrariness prevails”.⁶⁵ Then he makes the following clarification: “Transsexuals like [Delgado] must distinguish themselves from other groups with which they are mistakenly confused, such as transvestites, intersex, homosexuals and bisexuals”.⁶⁶ In summary, the Justice ends by noting that in this case it was not being decided whether the so-called “marriages” of homosexuals or the so-called de facto unions of persons of the same sex are valid or not.⁶⁷ He mentions that it is only about helping a human being who has suffered an anguished existence to make his future life a little more bearable, by modifying two particular documents: birth certificate and motor vehicle driver's license.⁶⁸

⁵⁹ *Id.* p. 193.

⁶⁰ *Id.* p. 197.

⁶¹ *Id.* p. 198.

⁶² *Id.* p. 201.

⁶³ *Id.*

⁶⁴ *Id.* p. 203.

⁶⁵ *Id.*

⁶⁶ *Id.* p. 205.

⁶⁷ *Id.* p. 207.

⁶⁸ *Id.*

Associate Justice Fiol Matta begins by affirming in her dissenting opinion that her legal conscience obliges her to state that she coincides with the previous pluralistic criterion of the Supreme Court and, in particular, with the bases set forth in the Concurring Opinion issued in that case by the Justice Associate Negrón García, who was joined by Associate Justices Hernández Denton and Fuster Berlingeri.⁶⁹ Associate Justice Fiol Matta explained that in the absence of law applicable to the case, the provisions of law that are or appear to be in conflict must be harmonized, filling in the gaps in the statute through case law.⁷⁰ According to Fiol Matta, when the Judicial Branch invokes equity to grant remedies, it does not usurp the functions of the Legislative Assembly⁷¹.

She explains that the judgment of the appellate forum that the Majority of the Supreme Court confirms, maintains that the sex reassignment operation does not alter the chromosomes of the person operated on and that therefore if an imperative to conclude that the transsexual person does not really change sex.⁷² Fiol Matta admits that it is true that the sex reassignment operation does not alter the chromosomes, “but this has nothing to do with the nature of the sex identification that is performed for the sole purpose of issuing a birth certificate”.⁷³ The Supreme Court Justice maintains that the determination of the sex of a newborn is limited to observing “the appearance of the genitals, without the need for a laboratory examination to determine whether the newborn's chromosomes correspond to the external appearance. Therefore, in the Demographic Registry, the information is completed to mark the box corresponding to sex using, as the sole and exclusive criterion, the external appearance”.⁷⁴ For Justice Fiol Matta, our legal system allows the use of the means provided by science to conform the appearance to the desired sex, if the transsexual person, exercising their free will, decides to do so.⁷⁵ In consequence, their right is protected by the right to privacy of our Constitution.

iii. *AAR, EX PARTE*

It is not the objective of this article to analyze the factual details that gave rise to the present opinion of the Supreme Court. Here, the Supreme Court denied a woman the possibility of becoming the legal mother of her same-sex partner's daughter.⁷⁶ We are interested in the expressions issued by the majority of the Supreme Court, by the voice of Associate Justice Pabón Charneco, on sex. Charneco begins by detailing that among the suspicious classifications prohibited in our legal system are those carried out by reason of the sex of the people and highlights that unlike the federal jurisdiction, the Constitution of Puerto Rico expressly prohibits this type of discrimination.⁷⁷ Citing a Report to the Constituent Convention, she explains that the Convention made it clear that the purpose of this constitutional provision “is to recognize the advent of women

⁶⁹ *Id.* p. 208.

⁷⁰ *Id.* p. 211-212.

⁷¹ *Id.* p. 213.

⁷² *Id.* p. 226.

⁷³ *Id.* p. 220-221.

⁷⁴ *Id.*

⁷⁵ *Id.* p. 227.

⁷⁶ See Glenda Labadie Jackson, *Derecho de Familia*, 83 REV. JUR. UPR 679 (2014).

⁷⁷ *AAR, Ex parte*, 187 DPR 835, 865 (2013).

to the fullness of the right and equal opportunities with the man”.⁷⁸ In other words, the search for said constitutional clause “will result in the complete eradication of legal discrimination with respect to women”.⁷⁹

The expositional analysis continues admitting that with the passing of the years, a large amount of literature has emerged regarding the meaning of the word “gender”, to the point where a consensus can be drawn as to which “gender” and “sex” they are not necessarily the same.⁸⁰ Pabón Charneco then states that the Supreme Court has never ruled that discrimination based on sexual orientation is a form of discrimination based on sex, showing that it is not possible to reach a conclusion other than that the aforementioned constitutional clause is limited to prohibiting discrimination based on archaic notions of the role of women in society:

It is not an honest intellectual exercise to pretend that the clause that prohibits discrimination for sex, with all its clear history and its purpose of eradicating archaic notions of the role of women in our society, is the vehicle that osmosis carries the discrimination based on sexual orientation. History simply shows us that the purpose of that clause is different.⁸¹

The opinion of Compliance issued by Associate Justice Martínez Torres, joined by Associate Justice Feliberti Cintrón, is a criticism of living constitutionalism.⁸² In particular, he focuses on discussing what he understands as inconsistencies between the position of Justice Rodríguez Rodríguez and Chief Justice Hernández Denton. The Opinion begins by reminding us of what was decided in *Andino Torres, Ex parte*, and the position assumed by Chief Justice Hernández Denton. Then he reminds us of what was resolved in *Delgado, Ex parte*, where in the face of a factual situation identical to that dealt with in *Andino Torres, Ex parte*, and explained that Justice Hernández Denton “changed his route and voted in accordance with the Opinion of the Court that, by voice of Associate Justice Mrs. Rodríguez Rodríguez, denied the request of a person to change their sex on their birth certificate”.⁸³ Use this as an example, to promote the position that living constitutionalism brings inconsistencies in the adjudication of controversies.

The Opinion of Conformity issued by Associate Justice Mr. Kolthoff Caraballo begins with the following statement: “On occasions we have changed the natural course of a river, and then suffer its fair rebellion. Wouldn't it have been better to stop reflectively on its shore and accept the wisdom of its Creation?”⁸⁴ Kolthoff Caraballo rationalizes that a “third sex” is something that is not real since such a group by the nature of things does not exist.⁸⁵ Also, he states that “sex” -in the chromosomal sense- and “sexual preference or orientation” do not always correspond to each

⁷⁸ *Id.* p. 865-866.

⁷⁹ *Id.*

⁸⁰ *Id.* p. 868.

⁸¹ *Id.* p. 869.

⁸² See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 907 (D. Md. 2018) (“Those who promote the theory of a “Living Constitution” argue that the Constitution must be able to adapt to current needs and attitudes that have changed since the original drafting. In other words, the Constitution does not have one fixed meaning but is a dynamic document the meaning of which can change over time.”).

⁸³ AAR, *Ex parte*, 187 DPR 835, 900 (2013).

⁸⁴ *Id.* p. 902.

⁸⁵ *Id.* p. 915.

other according to the general concept of things but may be dissociated in feeling or the psyche of a human being.⁸⁶ Citing *Delgado, Ex parte*, the Justice points out that from the constitutional point of view, a person's sex is an immutable characteristic determined solely by the mere fact of being born with them.⁸⁷ He also states that the concept of "gender", by describing it as a social and cultural construction that occurs historically and because it is a social phenomenon, can be transformed.⁸⁸ In other words, he designates it as a concept that can be dynamic and mutable, according to the society that builds it.⁸⁹ In that sense, the sex of a person is a biological and permanent state, gender is the way in which the person identifies himself in relation to the society that surrounds him.⁹⁰ In the footnote seven of his opinion he says that: "[i]t is known that any type of operation to "change" the sex of a person will only produce aesthetic effects, since the chromosomes of this will continue to define their sex in the way in which it was generated and conceived".⁹¹

The Opinion of Conformity of Associate Justice Rivera García indicates that sex is an obvious and verifiable data.⁹² His opinion severely criticizes what he calls gender ideology: "There are significant innate differences between women and men, dictated by genes and hormones that go beyond basic anatomy. These differences are obvious and exclusive".⁹³ Regarding dissenting opinions, particularly critical of the position of Justice Rodríguez Rodríguez in *Delgado, Ex parte*: "[T]he Associate Justice distances herself abysmally from the postulates that she previously defended tooth and nail. And it is that in the present case the fellow Justice invites us to ignore the natural reality and to stubbornly assume the role of the Legislative Assembly".⁹⁴ Regarding the distinction between men and women, he adds that: "[T]hey want to erase the identity of man and woman, censoring one of the most determining attributions in their life that by biology belongs to them: motherhood and fatherhood".⁹⁵

The dissenting opinion issued by Chief Justice Hernández Denton criticizes what he considers to be "judicial insularism".⁹⁶ Justice Hernández Denton answers the statement of Associate Justice Martínez Torres in relation to the principles of constitutional interpretation and his position in *Andino Torres, Ex parte*, and *Delgado, Ex parte*, ruling it out as irrelevant to the controversy.⁹⁷ However, the Chief Justice explains that he has no problems with stating that, if a case similar to *Andino Torres, Ex parte*, comes to the Supreme Court, he would do the same as he do on *Andino*.⁹⁸ He maintains in his dissent that before the development of the concept "gender", the word "sex" covered the universe of physical, psychological and social characteristics, as well as the behavior of the individual. From what it follows, it is evident that the word "sex", as used in

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* p. 916.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* p. 916 note 7.

⁹² *Id.* p. 940.

⁹³ *Id.* p. 953-954.

⁹⁴ *Id.* p. 959.

⁹⁵ *Id.* p. 956.

⁹⁶ *Id.* p. 964.

⁹⁷ *Id.* p. 975.

⁹⁸ *Id.*

our Bill of Rights, includes what was later included in the word "gender", in addition to the physiological meaning to which the word "sex" was later limited.⁹⁹

The dissenting opinion of Associate Justice Fiol Matta analyzes the relationship of sex and gender. For the Justice, it is clear that people who have been discriminated against because of their sex do not conform to the traditionally and culturally established sexual categories.¹⁰⁰ So, she gives the following examples of these divergences:

[W]e can point out that discrimination by sex goes hand in hand with discrimination by gender; that is, that people who do not fulfill the gender roles assigned to their sex are discriminated against, either, for example, because they want to work in an area in which people of their sex typically do not develop, because they want to have a physical appearance that is not what is considered "normal" for their sex, because they exhibit a behavior different from what has been taught to be acceptable for each sex or because they make decisions about their life, including their sexual life, that are not the more used in people of their sex.¹⁰¹

In Justice Rodríguez Rodríguez's dissent, she explains that discrimination based on gender constitutes discrimination based on sex because the classifications related to gender are established, necessarily, in relation to the sex of the person.¹⁰² In footnote 9, she addresses the criticism that the majority Justices made of her for her reasoning in *Delgado, Ex parte*.¹⁰³ The Honorable Justice points out that the Supreme Court, in that case, limited itself to interpreting the text of the Puerto Rico Demographic Registry Law and that it is legally incorrect to extrapolate the opinion in *Delgado* as the basis for rejecting the adoption request because it is irrelevant to the controversy.¹⁰⁴ In addition, she adds that the Demographic Registry Law, unlike the statute that regulates the institution of adoption, at no time orders to attend, on any other consideration, the best interest and welfare of the person requesting the change in the Demographic Registry.¹⁰⁵ Furthermore, she highlights that in *Delgado* no constitutional proposals were presented to support the petitioner's claim and that precisely with this the majority of the Justices agreed, who agreed with the Court's Opinion.¹⁰⁶ Associate Justice Martínez Torres differs from said expressions issued by Associate Justice Rodríguez Rodríguez. The purpose of the next statement seeks to highlight that there was a constitutional approach that, in the words of Martínez Torres, "the Opinion of the Court, issued by Associate Justice Mrs. Rodríguez Rodríguez, ignored".¹⁰⁷ Martínez Torres, citing Fiol Matta's dissent where she mentions that the petitioner:

⁹⁹ *Id.* p. 983.

¹⁰⁰ *Id.* p. 997.

¹⁰¹ *Id.* p. 997-998.

¹⁰² *Id.* p. 1044.

¹⁰³ *Id.* p. 1007 note 9.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

[R]eli[ed] on our Supreme Law, the Constitution of the Commonwealth of Puerto Rico, to claim her right to privacy and dignity, at the same time that she referred to our judgment in *Andino Torres, ex parte*, supra, and several Spanish judgments, with the aim of persuading us to reiterate the criterion that we adopted then.¹⁰⁸

As discussed below, the concept of gender and sex has been highly debated by the Supreme Court of Puerto Rico. From a serene reading of these positions, we can appreciate that there are two aspects or approaches referring to sex or gender. On the one hand, sex is analyzed as an immutable and inherent entity to the person and on the other hand, it can be seen that sex can be legally reconfigured. All of this is essential, as it serves as the basis for understanding what it is to be a woman for the purposes of labor protections.

iv. Meaning of sex in the precedents of the Supreme Court of Puerto Rico

As we can appreciate from the past precedents that govern the jurisprudence of the Supreme Court of Puerto Rico, sex is an “immutable, unchangeable and static fact”.¹⁰⁹ The vision of sex has been circumscribed in a binary¹¹⁰ approach keeping in mind the genotypic and phenotypic characteristics.¹¹¹ We consider that the Supreme Court through the expressions of the majority has adopted a static point of view, as an immutable element of sex. In other words, we refer in this case to chromosomal sex as a determinant to understand what the sex of a person is.¹¹² Although it also accepts that the sex of the people is identified, with very rare exceptions such as intersex people, by their anatomical and physiological characteristics and by their external morphology.¹¹³

¹⁰⁸ *Id.* p. 904.

¹⁰⁹ Christian Ríos Vallejo, *Formalismo Jurídico y los Disidentes de Género y Sexuales*, 86 REV. JUR. UPR 218, 242 (2017).

¹¹⁰ In this sense, binarism means the categorization of two groups, in this case, by the dominance of two reproductive systems.

¹¹¹ For the purposes of this article, the following definition of genotype and phenotype is used:

A person’s genotype is their unique sequence of DNA. More specifically, this term is used to refer to the two alleles a person has inherited for a particular gene. Phenotype is the detectable expression of this genotype – a patient’s clinical presentation. A person’s phenotype results from the interaction between their genotype and their environment.

Garvan Institute of Medical Research, *Genotype and phenotype*, <https://www.garvan.org.au/research/kinghorn-centre-for-clinical-genomics/learn-about-genomics/for-gp/genetics-refresher-1/genotype-and-phenotype>, (last visited January 4, 2021).

¹¹² According to the National Human Genome Research Institute:

A sex chromosome is a type of chromosome that participates in sex determination. Humans and most other mammals have two sex chromosomes, the X and the Y. Females have two X chromosomes in their cells, while males have both X and a Y chromosomes in their cells. Egg cells all contain an X chromosome, while sperm cells contain an X or Y chromosome. This arrangement means that it is the male that determines the sex of the offspring when fertilization occurs.

National Human Genome Research Institute, *Sex Chromosome*, <https://www.genome.gov/genetics-glossary/Sex-Chromosome>, (last visited January 4, 2021).

¹¹³ According to Ronald W. Didek, intersexuality is an anomaly: “events may occur whereby a fetus does not progress toward either of the two usual phenotypes, but gets caught in an intermediate stage known as intersexuality.” RONALD W. DIDEK, *HIGH-YIELD EMBRYOLOGY* 79 (2014). The author explains that there are other categories such as male pseudointersexuality. This “occurs when an individual has only testicular tissue histologically and various stages of stunted development of the male external genitalia. These individuals have a 46, XY genotype.” *Id.* Additionally, there is a complete androgen insensitivity. This “occurs when a fetus with a 46, XY genotype develops testes and female

From the point of view of the Supreme Court jurisprudence, sex in Puerto Rico is a static one. From the discussed precedents we can deduce that sex is the one with which each person is born and dies being the same unchangeable.

That is to say, for the Supreme Court, for the moment, sex is not something accessory, accidental or secondary in the subject. It could even be said that it is not a matter considered transitory. From the opinion of *AAR, Ex parte*,¹¹⁴ we can understand that the majority of the Supreme Court understands that men and women are essentially sexed beings in a permanent and immutable way.¹¹⁵ As we already expressed, the view about sex is that is something unalterable and accompanies the person from birth to death. Therefore, chromosomal identity is a quality that identifies the person and serves, at the same time, to differentiate it from others.¹¹⁶ The Supreme Court legal formalism understands that we are facing a reality or biological data that cannot be legally altered because it does not correspond to genetic reality.¹¹⁷ In short, the argument is reduced to the fact that the only authentic sex change is the one that occurs chromosomatically, and, as at the time of this writing it is impossible to carry out, the Supreme Court in its jurisprudence does not recognize that the other changes, such as the morphological and genetic, suppose a true change of sex. In other words, we can see that the view on the immutability of sex does not admit that a person with a biological sex has a different gender identity. For this immutable posture, the sexual identity will be formed according to and based on the biological assignment that the person has from birth. At the same time, biological sex subordinates gender identity and for that reason, according to this position, the law must reflect that subordination.

B. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

i. *Arroyo v. Rosselló*

Lambda Legal filed in 2017, a lawsuit in the federal Court for the District of Puerto Rico on behalf of Daniela Arroyo González and Victoria Rodríguez Roldán, two transgender women, JG, identified only by their initials as a transgender man, and the organization Puerto Rico para

external genitalia with a rudimentary vagina; uterus and uterine tubes are generally absent. . . . These individuals present as normal-appearing females, and their psychosocial orientation is female despite their genotype." *Id.* p. 80.

¹¹⁴ *AAR, Ex parte*, 187 DPR 835 (2013).

¹¹⁵ Associate Justice Kolthoff stated: "It is known that any type of operation to" change "the sex of a person will only produce aesthetic effects, since the chromosomes of this will continue to define their sex in the way in which it was generated and conceived." *Id.* *AAR, Ex parte.*, on p 916 on note 7 (Kolthoff, conformity opinion). In the Opinion of Conformity issued by Associate Justice Rivera García, statements are issued indicating what we are proposing here about the Supreme Court precedents:

[The gender ideology] assumes the social construction of sex identity and affirms that the differences between men and women have nothing to do with biology, but rather with socialization processes. However, several authors have pointed out that this ideology is "anti-intellectual" due to its rejection of science and other fields related to human nature, such as genetics, neurosciences or psychology, which "contradict the merely social character of the differences between men and women". *Id.* p. 949 (Rivera García, conformity opinion).

¹¹⁶ See Gian-Paolo Dotto, *Gender and sex—time to bridge the gap*, (April 12, 2019) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6505576/>. ("Sex refers to the biological and physical features linked with reproductive functions that result from the combined action of sex chromosomes and hormones".)

¹¹⁷ See Tuck C. Ngun et. al., *The Genetics of Sex Differences in Brain and Behavior*, (October 15, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3030621/>.

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Tod@s.¹¹⁸ The plaintiffs claimed their right to have their birth certificates corrected to reflect their gender identity, without their transgender status emerging from the certificate.¹¹⁹ They alleged that denying a transgender in Puerto Rico the possibility of obtaining birth certificates according to their gender identity is a violation of the Equal Protection and Due Process clauses of the United States Constitution because it obliges them, through their certificates of birth, to identify with the wrong gender.¹²⁰ At the same time, they alleged that the prohibition of changing the gender on the birth certificate violated their rights to freedom of expression, under the First Amendment.¹²¹

Justice Carmen Consuelo Cerezo begins her analysis by acknowledging that the right to privacy is recognized by the United States Supreme Court.¹²² In relation to the expressions issued by the Supreme Court in *Delgado*, she mentions the following: “The majority opinion in *Ex parte Delgado Hernández*, which defendants relied on in their opposition, is limited to the statutory interpretation of the Demographic Registry Law of Puerto Rico, and does not supersede this fundamental constitutional right”.¹²³ The judge understands that “[m]uch like matters relating to marriage, procreation, contraception, family relationships, and child rearing, “there are few areas which more closely intimate facts of a personal nature” than one’s transgender status.”¹²⁴ Continue explaining:

By permitting plaintiffs to change the name on their birth certificate, while prohibiting the change to their gender markers, the Commonwealth forces them to disclose their transgender status in violation of their constitutional right to informational privacy. Such forced disclosure of a transgender person’s most private information is not justified by any legitimate government interest. It does not further public safety, such that it would amount to a valid exercise of police power. . . . To the contrary, it exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger. Forcing disclosure of transgender identity chills speech and restrains engagement in the democratic process in order for transgenders to protect themselves from the real possibility of harm and humiliation. The Commonwealth’s inconsistent policies not only harm the plaintiffs before the Court; it also hurts society as a whole by depriving all from the voices of the transgender community.¹²⁵

After having outlined the previous reasoning, the Demographic Registry was ordered to authorize gender changes of transgender people.¹²⁶ It only allows two possibilities: man or

¹¹⁸ Arroyo González v. Roselló Nevares, 305 F. Supp. 3d 327 (2018). See Sebastian Arroyo Ignacio, *Arroyo v. Roselló: Comments on Gender Discourse*, <http://revistajuridica.uprrp.edu/inrev/index.php/2019/01/24/1723/>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* p. 332.

¹²³ *Id.* (citation omitted).

¹²⁴ *Id.* p. 333 (citation omitted).

¹²⁵ *Id.* (citation omitted).

¹²⁶ MICROJURIS, *Juez federal determina que la política sobre certificados de nacimiento en Puerto Rico es inconstitucional*, (June 27, 2018) <https://aldia.microjuris.com/2018/06/27/juez-federal-determina-que-la-politica-sobre-certificados-de-nacimiento-en-puerto-rico-es-inconstitucional/>.

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woman.¹²⁷ In this way, the Demographic Registry followed the orders of the district court through Circular Letter No. 3-18 (RD).¹²⁸

ii. After *Arroyo*: New Civil Code

As is known, the Legislature approved Law No. 55, known as the Civil Code of Puerto Rico, in 2020.¹²⁹ Puerto Rican private law is regulated there, including the change of sex in the Demographic Registry.¹³⁰ Article 694 of the Civil Code of 2020 directly states that “[i]n the original birth certificate, amendments to the sex of birth of a person cannot be authorized”.¹³¹ The statute then continues by saying the following: “[t]he court may, by judgment, authorize the register to make an entry outside the original registration of the person's sex when an amendment is appropriate due to the subsequent change or modification of the birth sex”.¹³² Therefore, it prohibits the elimination of the “historical, vital fact, of the sex of birth”.¹³³ Regarding people who are born intersex, through medical experts they determine the ambiguity of the fact of the sex of origin at the time of birth and “that fact is recorded in the minutes of the Demographic Registry, the judicial authority may order the substitution of the birth sex in its origin in the acts of the Demographic Registry”.¹³⁴ However, the Civil Code itself provides that the foregoing shall not undermine the process established in the cases of a request for a gender change to be reflected in the birth certificate.¹³⁵ The explanatory memorandum of Act No. 55 indicates it as follows:

This Book provides the process for the modifications of the name and sex in the original birth certificate. Nothing of what is here instituted undermines *the process currently established in cases of a request for a gender change to be reflected in the birth certification*. Under the current rule of law, these requests will be accompanied by the passport, the driver's license, a certification issued by a health professional who has a relationship doctor-patient with the applicant who proves the gender. In these cases the Registry must issue the certification, safeguarding the rights to privacy.¹³⁶

¹²⁷ For a critique of the decision see: Sebastian Arroyo Ignacio, *Arroyo v. Rosselló: Comments on Gender Discourse*, IN REV (January 28, 2019), <http://revistajuridica.uprrp.edu/inrev/index.php/2019/01/24/1723/>. There the author expresses the following:

The *Arroyo* Court assumes without question a binary notion of gender, and in so doing some life experiences are relegated. The juridical and medical discourse immersed with the natural attitude towards gender, reproduces traditional gender ideology and serves as an excuse to stigmatize and discriminate against those who transgress those norms.

Id.

¹²⁸ Carta Circular Núm. 3-18 (RD), *Para crear las instrucciones para el cambio de genero de transgéneros y para otros fines*, (2018), [http://www.salud.gov.pr/Servicios-al-Ciudadano/Documents/CARTA%20CIRCULAR%20NUM%203-18%20\(RD\)%20CAMBIO%20DE%20GENERO.pdf](http://www.salud.gov.pr/Servicios-al-Ciudadano/Documents/CARTA%20CIRCULAR%20NUM%203-18%20(RD)%20CAMBIO%20DE%20GENERO.pdf).

¹²⁹ Código Civil de Puerto Rico, Ley Núm. 55-2020, 31 LPRA §§ 5311-11722 (2020).

¹³⁰ *Id.* § 7655.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Ley Núm. 55-2020, Exposición de Motivos, (emphasis supplied) (translation supplied).

It should be noted that under said article of the Civil Code, the modification of sex that is not allowed is in the birth certificate known in Spanish as the "acta de nacimiento". On the other hand, the birth certificate ("certificado de nacimiento") can reflect the gender change made. Whether or not there is a difference between concepts, this will be determined by the Supreme Court in due course.

C. SUPREME COURT OF THE UNITED STATES

A. *Bostock v. Clayton County*

The facts of this case are easy to understand. First, Gerald Bostock, the plaintiff, worked for ten years in Clayton County, Georgia, the defendant.¹³⁷ When the county learned that Bostock was playing in a gay softball league, he was fired for "unbecoming" conduct.¹³⁸ Subsequently, Bostock sued in federal court for gender discrimination under Title VII of the Civil Rights Act of 1964.¹³⁹ The lower court dismissed her claim because Title VII, in the court opinion, does not prohibit discrimination based on gender or homosexuality.¹⁴⁰ The Eleventh Circuit affirmed that decision.¹⁴¹

However, two other courts ruled differently. In the case of Donald Zarda, a skydiving instructor and the plaintiff, he was fired after he mentioned that he was gay.¹⁴² In the case of Aimee Stephens, plaintiff and employee of a funeral home where she worked for years, she was fired after reporting her intention to live and work as a transgender woman.¹⁴³ In these two cases, the circuit in the Zarda and Stephens cases ruled that Title VII prevents a person from being fired for being homosexual or transgender.¹⁴⁴ The Supreme Court of the United States consolidates the three cases and hears them.

The controversy in this case is simple: Does Title VII of the Civil Rights Act of 1964, which prohibits against employment discrimination because of sex encompass discrimination based on an individual's sexual orientation or gender identity? Justice Gorsuch answers the question in a diaphanous way: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex".¹⁴⁵ Justice Gorsuch addresses the matter in a textual manner: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."¹⁴⁶ Although the expressions in this case are at the time of interpreting Title VII of the Civil Rights Act of 1964, they can serve as a guide for the interpretation of sex in Puerto Rico.

¹³⁷ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* p. 1737.

¹⁴⁶ *Id.*

To begin their analysis, the majority of the Supreme Court tells us: “The question isn’t just what “sex ” meant, but what Title VII says about it.”¹⁴⁷ As we know, when analyzing the prohibitions of Title VII, we must apply a ““because of “test””.¹⁴⁸ Then the majority Supreme Court expresses us that: “taken together, an employer who intentionally treats a person worse because of sex — such as by firing the person for actions or attributes it would tolerate in an individual of another sex — discriminates against that person in violation of Title VII”.¹⁴⁹ Therefore, the Supreme Court concludes that for the purposes of Title VII: “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”.¹⁵⁰

It is important to note that homosexuality or transgenderism is not being said to be “sex” in itself: “We agree that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”¹⁵¹ In summary, the Supreme Court decision in *Bostock* is vital for employers to understand the guidelines of discrimination on the basis of sex and their relationship with LGBTQ workers. This case will in all probability have an impact on other federal doctrines regarding the protection of civil rights.¹⁵²

II. Labor protections for working women

A. *Working mothers’ protection Act*

Law No. 3 of March 13, 1942, as amended, known as the *Workers’ Mothers Protection Act*, provides that the employer may not, without just cause, dismiss the pregnant woman.¹⁵³ In short, said legislation allows female pregnant workers to have the right to a rest period that will include four weeks before delivery and four weeks after.¹⁵⁴ The worker also has the possibility to chooses to take up to only one week of prenatal rest and extend the postnatal rest to which she is entitled up to seven weeks, provided that her employer is presented with a medical certification proving that she is able to work until one week before delivery.¹⁵⁵ In addition, any female employee who adopts a child under the age of five years or less who is not enrolled in a school institution, will be entitled to the same maternity leave benefits as the employee who gives birth.¹⁵⁶ If the minor is six years of age or older, the employee will be entitled to maternity leave of up to five

¹⁴⁷ *Id.* on p. 1739.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* on p. 1740.

¹⁵⁰ *Id.* on p. 1741.

¹⁵¹ *Id.* on p. 1746-1747.

¹⁵² Pattilyn B. Bermudez Solano, *Employment Discrimination on the Basis of Gender Identity and Sexual Orientation under Title VII, CRA of 1964*, FEDERAL BAR ASSOCIATION, (December 2020), <https://www.fedbar.org/wp-content/uploads/2020/12/OUTside-Influence-Fall-2020-FINAL.pdf> (“21 states, the District of Columbia (DC), and the Commonwealth of Puerto Rico (PR) expressly protect LGBTIQ individuals from employment discrimination on the basis of gender identity and sexual orientation.”)

¹⁵³ Working mothers’ protection, Act No. 3 of March 13, 1942, 29 LPRA §§ 467-474 (2017).

¹⁵⁴ 29 LPRA § 467.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

weeks.¹⁵⁷ In cases of adoption, the license will begin to run from the date the minor is received into the family nucleus and she should have notified the employer at least thirty days in advance of his intention to adopt a minor, to accept to maternity leave and her plans to return to work.¹⁵⁸ During the rest periods mentioned above, the employer will be obliged to reserve employment for the pregnant worker and the female worker who adopts a minor.¹⁵⁹ The only possible dismissal under these circumstances is that carried out with just cause and it will not be understood that the lower performance for work is just cause, due to pregnancy.¹⁶⁰

Now, who benefits from these work licenses? The law itself mentions that “[f]or the purposes of §§ 467—474 of this title, “working woman” shall be understood to be every woman employed, through salary, wages, day wages, or any other kind of compensation, in any office, commercial or industrial establishment, or public-service enterprise”.¹⁶¹ Now, it is worth asking, after the authorization of the change of sex in the Demographic Registry, what does the legislator refer to “woman”? Possible interpretations of this question will be discussed in next Part C.

B. Regulate the Period to Breastfeed or to Express Breast Milk Act

Law No. 427 of December 16, 2000, as amended, known as *Regulate the Period to Breastfeed or to Express Breast Milk Act*, regulates the period of breastfeeding or extraction of breast milk, providing working mothers who return to their work, after enjoying their maternity leave, that they have the opportunity to breastfeed their child during each working day.¹⁶² For purposes of this Act, “nursing mother” is “[a]ny woman working in the public or private sector who has given birth to a child, be it through natural methods or surgery, who is breastfeeding her baby; as well as any woman who has adopted a child, and who by the intervention of scientific methods is able to breastfeed the child.”¹⁶³ The Supreme Court of Puerto Rico has stated that breastfeeding is a right of all working women.¹⁶⁴ The Court explains that the importance of the integration of women in the world of work has made breastfeeding “an issue of great importance in the struggle of women to achieve equity in the world of work.”¹⁶⁵ Our highest judicial forum recognized that working women who wish to breastfeed their offspring “often find themselves faced with the unfair situation of having to choose between working and developing professionally or staying home to feed their newborn with breast milk.”¹⁶⁶ Actually, when the State attends to breastfeeding in the labor field, it addresses “a problem of elementary justice: that women have the same freedom as men to make the decisions they understand are correct, for them as a worker and for their children.”¹⁶⁷

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* § 468.

¹⁶⁰ *Id.* § 469.

¹⁶¹ *Id.* § 473.

¹⁶² Regulate the Period to Breastfeed or to Express Breast Milk Act, Act No. 427 of December 16, 2000, 29 LPRC § 478a.

¹⁶³ *Id.* § 478.

¹⁶⁴ *Siaca v. Bahía Beach Resort & Golf Club*, 194 DPR 559 (2016).

¹⁶⁵ *Id.* p. 577.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

In addition, the Supreme Court of Puerto Rico has interpreted that when an employer takes measures that make breastfeeding more onerous and *de facto* have the effect of preventing the working mother who voluntarily decided to breastfeed her son or daughter from exercising her right, then a violation of their right to privacy is incurred, protected by the Constitution of Puerto Rico.¹⁶⁸ It is important to note that this violation of the right to privacy only exists in those cases in which the mother is forced to make the decision to stop breastfeeding her child due to the negligent acts or omissions of her employer.¹⁶⁹ Ultimately, the decision of which food to choose for her newborn belongs to the category of intimate and important decisions that a mother is completely free to make as part of her fundamental right to privacy in her decision-making aspect.¹⁷⁰ Now, what is the meaning of the word “woman” in the employment context? Is it limited to the provisions of the birth certificate in the Demographic Registry or should the biological aspects of the person be taken into account?

C. Hermeneutics: Definition of women in the Puerto Rican legal system

The Civil Code of Puerto Rico dictates the general rules for the interpretation of the law. Its literalist principle reads as follows: “When the law is clear and free from all ambiguity, its text should not be underestimated under the pretext of fulfilling its spirit.”¹⁷¹ Regarding the meaning of words, the Civil Code states that: “[t]he words of the law are generally understood by their usual and current meaning, without paying too much attention to the rigor of grammatical rules, but to the general and popular use of voices; but when the legislator has expressly defined them, they are given their legal meaning.”¹⁷² It is also important that “[t]o discover the true meaning of a law when its expressions are ambiguous, its reason and spirit will be considered, through attention to the objectives of the legislator, the cause or the motive for dictating it.”¹⁷³

From a comprehensive reading of both labor provisions previously discussed, we can deduce that the objective of the legislator is to protect the sex of pregnant, adopting and lactating women because of the inequalities that may arise when competing with a man in the workplace. On this matter, the Supreme Court of Puerto Rico already expressed itself in 1948:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him . . . that her physical

¹⁶⁸ *Id.* on p. 583.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* on p. 585.

¹⁷¹ Cód. Civ. PR art. 19, 31 LPRA § 5341 (2020) (translation supplied).

¹⁷² *Id.* § 5344

¹⁷³ *Id.* § 5342.

structure and a proper discharge of her maternal, functions—having in view not merely her own health but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. . . . This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.¹⁷⁴

In this way, the Court concludes that the State has a special interest in the protection of working women.¹⁷⁵ In the case of *Ponce Candy*, where the mother became pregnant as a result of an adulterous relationship, the employer argued that said labor protection did not protect “illegitimate working mothers”. The Supreme Court of Puerto Rico responds as follows:

The law makes no distinction whatsoever between the legitimate or illegitimate mother and we should not, by judicial construction, limit the scope of the statute which aims to protect the health and lives of working mothers in general. The intent of the Legislature was clearly set forth in applying the law to “every woman”, without any kind of restriction.¹⁷⁶

Later in *Zachry International* the Supreme Court stated that “the Constitution recognizes, like nature itself, differences based on sex and allows them if they do not discriminate.”¹⁷⁷ Regarding the labor aspect of women, the Supreme Court indicated that one of the consequences of the phenomenon of female mobility towards economically productive work is that the State can legislate in order to recognize the advent of women to the fullness of the right and equal opportunities with men.¹⁷⁸ After these expressions, they are reaffirmed in *Pueblo v. Rivera Morales*, where the Supreme Court accepts that the physiological differences that exist between the sexes can legitimately justify in some specific situations the differential treatment of women and men, so that motherhood is a legitimate basis for granting certain rights only to the female sex.¹⁷⁹

Now, we must delineate the interpretive parameters to address the problem that we have raised. That is, if a person registered as a man, but who biologically gave birth to a child, can qualify for maternity benefits. Also, we must discuss whether a person registered as a woman, but who was born as a biological man, is entitled to benefit from maternity benefits after adopting a minor. As we have discussed in Part I of this article, for the Supreme Court of Puerto Rico there is an evident distinction between a man and a woman of a biological character. Sex is reduced to the physiological aspect and not to the social constructions that can be created on it.

Therefore, a possible interpretation that the Supreme Court can give to this panorama is that women and men are exclusively what their genital and reproductive system indicates, and

¹⁷⁴ *Ponce Candy Indus. v. Corte*, 69 DPR 417, 423-424 (1948).

¹⁷⁵ *Id.* on p. 424.

¹⁷⁶ *Id.* on p. 427-428.

¹⁷⁷ *Zachry Int'l of P.R. v. Tribunal Superior De P.R.*, 104 DPR 267, 279 (1975).

¹⁷⁸ *Id.* on p. 280.

¹⁷⁹ *Pueblo v. Rivera Morales*, 133 DPR 444 (1993).

ultimately, what their genetics dictate.¹⁸⁰ This means that a woman would be that person who in the Demographic Registry is found of the historical, vital fact, of the female birth sex, although there is an annotation outside the original registration of the sex indicating that it is male.¹⁸¹ Consequently, if a person is born with a uterus, to house a fetus; produces vaginal and uterine secretions, has uterine or fallopian tubes; and the ovaries produce the female oocytes or gametes; externally having a vulva, then we would be before a woman.¹⁸² This person would be a woman for the purposes of the legal system, even if it is an extraregistraral reality. Therefore, under this interpretation of what a woman is, only those people who can biologically give birth,¹⁸³ or who, having a so-called female reproductive system, decide to adopt, could benefit from maternity leave. Then, if a person who was born as a woman, in this physiological sense, decides to change the sex with which he appears registered in the Demographic Registry for the category of man, and later becomes pregnant and gives birth to a child, then we can conclude that this person would be beneficiary of maternity leave, despite the fact that for the purposes of the Demographic Registry that mother, in the biological sense, is a man.¹⁸⁴

This interpretation results in the existence of registry women who lack the right to maternity leave. For example, a person who was born with testicles, epididymis, penis, scrotum, vas deferens and accessory glands that include the prostate and bulbourethral glands would be considered men for the purposes of the legal system, regardless of whether this does not correspond to the Registry reality.¹⁸⁵ In this sense, it is clear that the meaning of women at the time of writing both protective laws for working mothers was the one we have outlined.

In the case of breastfeeding, one of the requirements to be a beneficiary of these labor rights is to be a woman who works and who has given birth to a child and is raising her baby or who is a woman who has adopted a child and through intervention of scientific methods has the ability to breastfeed.¹⁸⁶ Applying the interpretive theory set out above, it does not matter if we are dealing with an extra-registry or registry woman, the determining criterion is the vital fact of the sex that the person have at birth.¹⁸⁷ Now, in this case, the important thing is breastfeeding the child, since that is the objective that the legislation seeks to protect. However, for purposes of the previous

Commented [DACAS]: An indent of 0.5" to the left is required for the block quote cited in the footnote. The citation should be placed immediately after the block quote.

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¹⁸⁰ This interpretation is similar to the one presented by Associate Justice Corrada del Río:

The fact that a transsexual undergoes sex change surgery, can lead to a contrast between the external genital elements and the chromosomal and hormonal sex. However, to determine the sex of a person who underwent a sex change surgery, it is not enough to listen to her physique. It is also necessary to evaluate their chromosomal, hormonal, genetic and psychological characteristics. Andino Torres Ex parte, 151 DPR 794, 834-835 (2000) (Corrada del Río, dissenting).

¹⁸¹ Cód. Civ. PR art. 694, 31 LPRA § 7655 (2020).

¹⁸² See FRANK H. NETTER, ATLAS OF HUMAN ANATOMY 342 (2011).

¹⁸³ See Valinda Riggins Nwadike, *Can Men Get Pregnant?*, HEALTHLINE, (December 20, 2018), <https://www.healthline.com/health/transgender/can-men-get-pregnant>

¹⁸⁴ In this sense, woman would be equivalent exclusively to what is exposed by biology even if it differs from what is registered in the Demographic Registry.

¹⁸⁵ See NETTER *supra* note 116 on p. 346.

¹⁸⁶ 29 LPRA § 478.

¹⁸⁷ In our legal system, it would be the original birth certificate (“acta de nacimiento”).

principles, a transgender woman,¹⁸⁸ even if she could breastfeed, would not have the right, because she does not meet the criteria of having been born a woman.¹⁸⁹

Yet, a teleological stance could argue that the purpose of the legislation seeks to protect “all women” regardless of whether they are registered or extra-registered.¹⁹⁰ For this possible interpretation, woman is not reduced to a single category, but “woman” would mean multiple categories at the legal level. In this regard, women who are born with the aforementioned female biological description would be protected, whether or not this is registered in the Demographic Registry, and, also, a person who is registered as such would also be a woman, even if their reproductive system at birth is male. In this way, an employer would have to grant maternity

Commented [DACA7]: We believe the word intended in this context is 'teleological'.

¹⁸⁸ A “transsexual woman” or “female transsexual” refers to a woman, who is assigned to the male sex at birth, and decides to undergo hormonal treatments or different surgical procedures to acquire secondary sexual characteristics stereotypically associated with the female sex. In addition, these terms are used to designate those who have already undergone genital reassignment surgeries or for those who consider the performance of these surgeries as essential within their transition process. On the other hand, a “transgender woman” is a term that refers to a woman assigned to the male sex at birth who does not necessarily undergo a medical or surgical transition to fully identify herself as a female, despite feeling a dissonance between her gender identity and the sex he was assigned at birth. In this way, not all transgender women have the same idea of what “being a woman” means, so not all transgender women want to have genital reassignment surgery, nor do they all want to take hormones. See Juliana Martínez, *Travesti, transexual, transgénero... Algunas definiciones útiles*, SENTIDO, (May 14, 2014), <https://sentiido.com/travesti-transexual-transgenero-algunas-definiciones-utiles/>; Ariana M. Sierra Osorio et. al., *Disforia de género / Incongruencia de género. Terapia hormonal en adultos*, REVISTA COLOMBIANA DE ENDOCRINOLOGÍA, DIABETES & METABOLISMO 5 (4): 32, (November 20, 2018), <http://revistaendocrino.org/index.php/rcedm/article/view/452/596>; Jordi Mas Grau, *Del transexualismo a la disforia de género en el DSM. Cambios terminológicos, misma esencia patologizante*, REVISTA INTERNACIONAL DE SOCIOLOGÍA 75 (2), <http://revintsociologia.revistas.csic.es/index.php/revintsociologia/article/view/673/825>.

¹⁸⁹ See Tamar Reisman and Zil Goldstein, *Case Report: Induced Lactation in a Transgender Woman*, TRANSGENDER HEALTH VOL. 3, NO. 1, (January 1, 2018), <https://www.liebertpub.com/doi/10.1089/trgh.2017.0044>.

¹⁹⁰ See THE EDITORS OF ENCYCLOPAEDIA BRITANNICA, *Teleology*, (April 19, 2016), <https://www.britannica.com/topic/teleology>.

benefits to transgender men¹⁹¹ who give birth¹⁹² and transgender women who adopt.¹⁹³ In the other hand, the only person who could not qualify for the benefits would be what is called a masculine cisgender man.¹⁹⁴

¹⁹¹ A “transsexual man” or “male transsexual” refers to a man, who is assigned to the female sex at birth, and decides to undergo hormonal treatments or different surgical procedures to acquire secondary sexual characteristics stereotypically associated with the male sex, such as beard, pronounced Adam’s apple or deep voice, among others. In addition, these terms are used to designate those who have already undergone genital reassignment surgeries or for those who consider the performance of these surgeries as essential within their transition process. On the other hand, a “transgender man” is a term that refers to a man assigned to the female sex at birth who does not necessarily undergo a medical or surgical transition to fully identify himself as a male, despite feeling a dissonance between her gender identity and the sex she was assigned at birth. In this way, not all transgender men have the same idea of what “being a man” means, so not all transgender men want to have genital reassignment surgery, nor do they all want to take hormones. See Juliana Martínez, *Travesti, transsexual, transgénero... Algunas definiciones útiles*, SENTIDO, (May 14, 2014), <https://sentiido.com/travesti-transsexual-transgenero-algunas-definiciones-utiles/>; Ariana M. Sierra Osorio et. al., *Disforia de género / Incongruencia de género. Terapia hormonal en adultos*, REVISTA COLOMBIANA DE ENDOCRINOLOGÍA, DIABETES & METABOLISMO 5 (4): 32, (November 20, 2018), <http://revistaendocrino.org/index.php/rcedm/article/view/452/596>; Jordi Mas Grau, *Del transexualismo a la disforia de género en el DSM. Cambios terminológicos, misma esencia patologizante*, REVISTA INTERNACIONAL DE SOCIOLOGÍA 75 (2), <http://revintsociologia.revistas.csic.es/index.php/revintsociologia/article/view/673/825>. In the Concurring Opinion of the Associate Justice Mr. Negrón García, joined by the Associate Justices Mr. Hernández Denton and Fuster Berlingeri in *Ex parte Andino Torres* defined transsexuality as “a psychological condition in which a person feels that his biological sex does not correspond to his perception of himself.” *Ex parte Andino Torres*, 151 DPR 794, 797 n.2 (2000). Associate Justice Mr. Negrón García mention that:

People who suffer from this condition seek to alter their sex to conform to their psychological identification, sometimes through hormonal treatment or surgical intervention. The pre-operative transsexual can then be distinguished, who has not attempted a morphological change- genital, post-operative, which has altered his physical appearance in this way.

Id. (translation supplied).

For Fuster Berlingeri:

The transsexual suffers from a well-known medical condition, for which various therapies and particular treatments relevant only to them have been developed. Such transsexual people suffer from the serious discord of feeling with their whole being that they are male or female despite the fact that their anatomical features are of the opposite sex. The scientific literature is full of studies and monographs on this anomalous condition, which highlight the anguishing existence of those who suffer from it, leading some of them to suicide, or at least to the attempt to take their own lives. The most that these transsexual people want is to be able to rectify the involuntary disorder of sexual identity that they suffer, in order to integrate their existence and live in the most normal way possible. Their status as transsexual as such has nothing to do, for example, with the inclination of transvestites to dress in clothes of the opposite sex, or with the inclination of homosexuals to intimate relationships with people of the same sex, but quite the opposite.

Ex parte Delgado Hernández, 165 DPR 170, 206 (2005) (Fuster Berlingeri, dissent).

¹⁹² See Juno Obedin-Maliver and Harvey J. Makadon, *Transgender men and pregnancy*, OBSTET MED. 2016 MAR; 9(1): 4–8, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4790470/> (“Born with female reproductive organs, transgender men may elect to have any of a number of sex reassignment surgical procedures, although the largest survey on this subject showed that most have not . . . This leaves many transgender men with the capacity to bear children.”); Alexis D. Light, et. al., *Transgender men who experienced pregnancy after female-to-male gender transitioning*, OBSTET GYNECOL. 124 (6): 1120–1127, <https://escholarship.org/content/qt3dz427qw/qt3dz427qw.pdf?t=ptt51b> (“Many transgender men desire children and there are anecdotal reports supporting the biological possibility of pregnancy for transgender men who retain a uterus and discontinue testosterone therapy.”).

¹⁹³ Puerto Rico Adoption Law, Law No. 61-2018, 8 LPRA §§ 1081-1087a.

¹⁹⁴ “[M]ost people are cisgender, meaning that their gender identity—or their “deeply felt, inherent sense” of their gender—aligns with their sex-assigned-at-birth.” *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020).

In the case of nursing mothers, the interpretation could be extensive. That is, what matters is whether the person can breastfeed, it does not matter if she is a registered or extra-registered biological woman, or if she is a transgender woman registered as a woman at the margin of the Demographic Registry. The criteria will be in all the categories that the person can breastfeed.

Notwithstanding all of the above, the reality is that none of these interpretations have been made with the labor legislation. It is important that all employers are aware of them and evaluate whether they will provide maternity and breastfeeding benefits to transgender people. A cost benefit analysis should be performed comparing the possible expenses of litigation versus granting the license.

CONCLUSION

Human diversity and the legal discourse on what are a man and a woman for labor purposes must be defined. There is a genuine ambiguity and uncertainty about the possibility that people can change their sex. Employers must be sure that their actions or omissions are legal and nondiscriminatory. The law should be clearer on the issue of sex and gender. I mean that when the words “man” and “woman” are used, it must be specified whether it is exclusively biological sex or not. Despite our efforts to predict what the Supreme Court's interpretation of this controversy is, the factual reality is that at the moment there is no clear answer. There are only guesswork and possible deductions.

After *Arroyo*, these points will need to be addressed. For the moment, we can say with certainty that the body continues to be the main symbol for classifying humans in a binary framework. For that reason, the Puerto Rican case is one where sex is defined with the genital form within binarism. This means that, at the moment, only the female or male classifications are understood. In that sense, the birth certificate fulfills a historical function in the Puerto Rican legal system. So much so, that from there we can understand who is or is not of a certain registered sex, due to its relationship with the person's identification. Due to the divergence of interpretations, the Supreme Court will have to review transsexuality and transgenderism in Puerto Rico again.

I also suggest that the Legislature of Puerto Rico address the reality of labor transsexualism in Puerto Rico so that it provides us with a better framework with which to work and thus obtain certainty. It is vital that the legal system can tell us how strict this binary is in labor law. Ignoring that sex change is a legal reality brings with its problems that can highlight litigation between employers and employees. In short, it remains the great task of legal operators to think of these alternative interpretations set out in this article. Regardless of the interpretation favored, what must always prevail is the constitutional principle that human dignity is inviolable.