

# FILLING THE LEGAL VOID IN INTERSTATE LEGAL GENDER RECOGNITION IN THE EUROPEAN UNION: A U.S. STYLE FULL FAITH AND CREDIT CLAUSE AND *COMAN*-BASED APPROACH

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## I. INTRODUCTION

Gender-reveal parties, where expecting parents announce their baby’s sex, are a damaging phenomenon in our pop culture.<sup>1</sup> Even Jenna Karvunidis,

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1. Rachel Charlene Lewis, *The Internet Has (Literally) Accelerated Gender Reveal Parties*, BITCH MEDIA (Sept. 10, 2020, 10:01 AM), <https://www.bitchmedia.org/article/gender-reveal-parties-causing-wildfires-destruction>.

a fellow Southwestern student, who started the trend in 2008, is now against it.<sup>2</sup> The idea of parents' determining the identity for their child is not only limiting, but also potentially harmful to the new person. It is unnecessary and wrong. Gender identity cannot be decided without the most important consideration and the only one that matters: the person's self-determination.

"Self-determined gender . . . is a cornerstone of the person's identity,"<sup>3</sup> and there is no reason for denying that right. Gender identity may or may not correspond with the sex assigned at birth. It is manifested in gender expression, including sense of the body, dress, speech, and mannerisms, but gender expression may or may not conform to a person's gender identity.<sup>4</sup> Furthermore, gender identity may not follow Western binary concepts of gender.<sup>5</sup> It is time all countries allow for gender self-determination in legal gender assignment, inclusion of non-binary gender markers,<sup>6</sup> and postponement of the attribution of legal gender. Yet, many countries still deny these rights—invoking public policy considerations such as national identity, custom, and tradition. The only practical disadvantage raised by the opponents is the administrative institutional cost of reassigning gender and revising the documents and records. But this has proved to be a *de minimis* problem.<sup>7</sup>

Improving the recognition procedures of trans, nonbinary, and intersex people is one of the 2020-2025 action items of the first-ever EU LGBTIQ Strategy, presented by the President of the European Commission in the 2020 State of the Union 2020 address.<sup>8</sup> In the European Union (EU), legal gender can be confirmed through a self-determination procedure in only four Member States.<sup>9</sup> The vast majority of states have adopted differing

2. Jenna Karvunidis, *I Started the 'Gender Reveal Party' Trend. And I Regret It*, GUARDIAN (June 29, 2020, 2:00 EDT), <https://www.theguardian.com/lifeandstyle/2020/jun/29/jenna-karvunidis-i-started-gender-reveal-party-trend-regret>.

3. U.N. Secretary-General, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, ¶ 21, U.N. Doc. A/73/50 (July 12, 2018).

4. *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement The Yogyakarta Principles*, THE YOGYAKARTA PRINCIPLES, Nov. 10, 2017, at 6 [hereinafter *Yogyakarta Principles + 10*].

5. Some cultures have long recognized and respected the existence of a third gender, e.g., South Asian *hijras*, *kathoeyes* in Thailand, or *ashtime* in Ethiopia. Tomás Mier, *Death of an Indigenous Essential Worker Sparks Debate over Gender Identity*, L.A. TIMES (Aug. 24, 2021, 5:00 AM), <https://www.latimes.com/california/story/2020-08-24/angela-martinez-muxe-obituary>.

6. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, THE YOGYAKARTA PRINCIPLES, Mar. 2007, at 11-12 [hereinafter *Yogyakarta Principles*].

7. RICHARD KÖHLER & JULIA EHRT, LEGAL GENDER RECOGNITION IN EUROPE: TOOLKIT 83 (Jennie Kermode ed., 2nd ed. 2016).

8. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025* COM (2020) 698 final (Nov. 12, 2020) [hereinafter *2020-25 Strategy*].

9. *Id.* at 1.

requirements for gender reassignment such as age, a disorder diagnosis, medical procedures—including sterilization—and a divorce. In five countries, there are no legal norms regulating gender reassignment at all.<sup>10</sup>

Additionally, the EU has another, long recognized, problem: a “legal void” in registering a legally obtained civil status (such as gender) in another Member State primarily because the regulations in the civil status area differ between the states.<sup>11</sup> The Treaty on the Functioning of the European Union (TFEU) asserts the principle of mutual recognition in civil and criminal matters, but it does not mention civil status. Civil status is explicitly excluded from the EU Directive on mutual recognition of civil and commercial judgments.<sup>12</sup> The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) held that civil status is within the exclusive competence of each Member State. Although there have been cases before those tribunals addressing interstate recognition of the legal name and marital status that was changed in another EU jurisdiction, neither of the EU courts has ever addressed interstate gender recognition.<sup>13</sup>

The EU Member States have shown no interest in uniform rules for civil status mutual recognition. On the contrary, the recognition has become more complex. There are many bilateral and multilateral agreements<sup>14</sup> with exceptions, or conventions ratified by a limited number of countries, in addition to local rules applicable in each Member State.<sup>15</sup> The latest

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10. European Commission, *Legal Gender Recognition in the EU, the Journeys of Trans People towards Full Equality* 7 (June 2020) [hereinafter *Journeys towards Full Equality*].

11. *Civil Status Documents—Challenges for Civil Registrars to Circumvent Problems Stemming from the Legal Void*, at 4 (2012), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2012/462500/IPOL-JURI\\_NT\(2012\)462500\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2012/462500/IPOL-JURI_NT(2012)462500_EN.pdf) [hereinafter *Civil Status Documents*].

12. Council Reg. 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1, 3 (EC); *see generally*, Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) (EU) [hereinafter TFEU].

13. There is also an International Commission on Civil Status, but not all European countries are members and, furthermore, even less signed and ratified its conventions. More importantly, the last ICCS convention on the decisions regarding a sex reassignment signed in Vienna in 2000 is not very helpful in protecting the rights of non-gender conforming people. *See generally* Convention (No. 29) on the Recognition of Decisions Recording a Sex Reassignment, Dec. 12, 2000, [http://www.ciec1.org/SITECIEC/PAGE\\_Conventions/fAQAAE8K\\_EZqYWdzVVhGZ3poXwU](http://www.ciec1.org/SITECIEC/PAGE_Conventions/fAQAAE8K_EZqYWdzVVhGZ3poXwU).

14. Hague Convention and ICAA, not ratified by all countries, and Denmark seems to be excluded from the agreements. *Commission Green Paper, Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of Civil Status Records*, at 6, COM (2010) 747 final (Dec. 14, 2010) [hereinafter *Green Paper*].

15. *Id.* at 7.

regulation<sup>16</sup> focuses on simplifying the formalities in the authentication of documents and mutual administrative cooperation, but there is no more determined movement in the direction of automatic recognition of civil status documents and judgments.

The lack of uniformity in the regulations of legal gender recognition and the “legal void” in the area of registering a legally obtained gender reassignment in another Member State<sup>17</sup> is unduly burdensome to already stigmatized and marginalized groups. What happens when a transgender person relocates to a state with more demanding procedures and wants to have the gender reassignment recognized or wants to enforce it? The answer is not simple. The local courts make those decisions on a country-by-country and case-by-case basis. Such ad hoc adjudication denies the transgender people legal predictability and reliance. Moreover, the recognition or enforcement procedure is not always simple and clear.<sup>18</sup> Procedural standards vary too. In some countries, for example Holland or Ireland,<sup>19</sup> an administrative certificate reconfirms gender, and others require a court judgment to recognize a preferred gender.<sup>20</sup> This creates a problem when the receiving court refuses recognition for the lack of finality in the decision of an administrative body. The petitioner, now, must return to the organ that granted their gender reassignment decision to obtain a certificate stating the decision was final. Cost, time, and undue burdens accumulate. Finally, when the gender recognition results in a same-sex marriage, the judgment will not be recognized in the EU Member States that prohibit same-sex unions, unless the petitioner obtains a divorce.<sup>21</sup>

Practical issues that result from the discrepancy between one’s lived gender and gender marker in the official documents permeate all areas of life, including access to health care and financial services or competing in the job market. For example, during a job interview, a college diploma with a different legal name will unnecessarily deviate attention to the very personal subject of gender identity rather than the candidate’s qualifications. As a result, transgender people are reluctant to travel fearing discrimination and

16. Commission Regulation 2016/1191, Promoting the Free Movement of Citizens by Simplifying the Requirements for Presenting Certain Public Documents in the European Union and Amending Regulation, art. 26, 2016 O.J. (L 200).

17. *Civil Status Documents*, supra note 11 at 5; see also *Green Paper*, supra note 14 at 13.

18. See generally Inês Espinheiro Gomes, *Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity*, in STUDY PAPERS (Europa Kolleg Hamburg study paper 04/19, ed. 2019).

19. Dep’t Soc. Prot., *Apply for a Gender Recognition Certificate/Revised Birth Certificate*, GOV’T IR. 3 (last updated Apr. 22, 2021), <https://www.gov.ie/en/service/b55abf-gender-recognition-certificate/?referrer=https://www.welfare.ie/en/Pages/GRC1.aspx>.

20. *Journeys towards Full Equality*, supra note 10, at 109.

21. Same-sex marriage is not legal in Romania, Poland, Hungary, Bulgaria, Latvia, Lithuania, and Slovakia. Arpi Avetisyan & Juliana Teoh, *Together We Can Make the Coman Judgment a Reality: The Freedom of Movement of Same-Sex Couples Across the EU*, ILGA EUROPE (Mar. 28, 2019, 9:00 AM), <https://ilga-europe.org/blog/together-we-can-make-coman-judgment-reality>.

suspicion that they have used falsified documents.<sup>22</sup> The stakes are even higher for asylum seekers and refugees who face discrimination and violence.<sup>23</sup>

Furthermore, nonrecognition of legal gender obtained in another Member State may violate human rights<sup>24</sup> and such fundamental principles of the EU like freedom of movement and residence.<sup>25</sup> The law, instead, could foster the positive change advocated by human rights experts. Their guidelines have been outlined in the Yogyakarta Principles<sup>26</sup>—the most comprehensive and significant proclamation of states' obligations under the international human rights law in relation to sexual orientation and gender identity.<sup>27</sup>

The ideal solution is achieving uniformity among national regulations of gender self-determination in all EU Member States. This is very unlikely to happen in the foreseeable future due to the states' sovereignty and interest in maintaining strong identity and values, which are shaped by, among other factors, local attitudes towards marriage and gender. Even assuming that the Member States would take steps towards that outcome, it would be a long process.<sup>28</sup>

Another proposed solution is transferring the competence for regulating the area of civil status, including gender, from Member States onto the EU institutions,<sup>29</sup> assuming those institutions would follow the self-determination framework and provide easy access to legal recognition. This is rather wishful thinking, especially in light of the current conservative shift in some EU countries. Even under a tighter federal structure like that in the United States, marriage has traditionally been regulated by the states because it reflects traditional values of the local society, often fortified by religious beliefs.

This note argues that there is a feasible and more direct solution that would allow for automatic and nearly unconditional interstate legal gender

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22. Transgender Europe, Submission to the DG Home Affairs Consultation on the 'Post-Stockholm Programme,' (Jan. 21, 2014) (on file with author).

23. KÖHLER & EHRT, *supra* note 7, at 18.

24. Possible violations of the ECHR include right to respect for private and family life, right to marry and to found a family, and prohibition of discrimination. *See, e.g.,* Hämäläinen v. Finland, App. No. 37359/09, 219 Eur. Ct. H.R. (2014).

25. TFEU, *supra* note 12, at 17; *see also id.* at Titles IV and V; Charter of Fundamental Rights of the European Union art. 45, 2000 O.J. (C 364); *Eur. Parl. Fact Sheets on the Eur. Union*, EUR. PARL., <https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons> (last visited Oct. 3, 2020).

26. *Yogyakarta Principles*, *supra* note 6.

27. SHEILA QUINN, AN ACTIVIST'S GUIDE TO THE YOGYAKARTA PRINCIPLES 134 (2010).

28. *Civil Status Documents*, *supra* note 11, at 5.

29. *Id.*

recognition. The existing legal void can be filled with a combination of legislative and judicial measures. The EU should adopt a full faith and credit clause (FFCC) to introduce a clear uniform rule for mutual recognition and enforcement of gender reassignment judgments. That basic legal framework should be complemented with strategic litigation to address the limitations of the FFCC. The guidelines are readily available in a recent case in the area of LGBTQ and civil status. In its landmark decision in *Coman v. Romania*,<sup>30</sup> the ECJ held that a Member State cannot impair the right to move and reside freely in the EU, even if it means recognizing a valid same-sex marriage contracted in another member state that could not be legally contracted in Romania. Because the areas of gender and marriage involve the same right to respect for family and private life and apply similar reasoning, that ruling could be expanded to the recognition of a legal gender acquired in another Member State.

## II. BASIC FRAMEWORK: A EUROPEAN FULL FAITH AND CREDIT CLAUSE FOR THE BENEFIT OF INTERSTATE GENDER RECOGNITION

### A. *Current Constitutional Doctrine and Practice in the United States*

Article IV of the U.S. Constitution makes it clear that the states must give “Full Faith and Credit . . . in each state to the public Acts, Records, and judicial Proceedings of every other State.” Furthermore, it gives Congress the power to “prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”<sup>31</sup> The Effect Clause subjects the right to recognition conferred by the FFCC clause to qualifications that Congress may impose.<sup>32</sup> The longstanding constitutional doctrine asserts that if a state court rendered a valid judgment, it is binding on all other states.<sup>33</sup> The receiving state may, however, reject a judgment from another state if there is a strong public policy that would oppose applying the laws of the state rendering the judgment to the dispute.<sup>34</sup>

The clause was intended to protect individual, judicially confirmed, rights in relation to the right to travel and to advance enforcement of those rights.<sup>35</sup> It deliberately imposed a binding obligation on the states.<sup>36</sup> That obligation is self-executing, thus promoting legal certainty and efficiency by

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30. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385, (Jun. 5, 2018).

31. U.S. CONST. art. IV, §1.

32. *Id.*; David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51, 57 (2011).

33. Cruz, *supra* note 32, at 56.

34. *Id.* at 58.

35. Pamela K. Terry, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 FORDHAM L. REV. 3093, 3134-35 (2012).

36. Cruz, *supra* note 32, at 56.

mandating the states to respect other states' judgments and the individual rights that flow from those judgments.<sup>37</sup>

In practice, in most states, a valid court order<sup>38</sup> reaffirming a person's legal gender is deemed sufficient to establish the person's gender for all legal purposes in the receiving state.<sup>39</sup> For example, in Texas there is no judicial procedure to obtain a court order recognizing a change of gender, but Texas recognizes such orders from other jurisdictions.<sup>40</sup> Similarly, Ohio does not have a statute or administrative policy that permits issuing a new birth certificate to a transgender person, but Ohio will issue a new birth certificate upon the presentation of a valid court order from another state.<sup>41</sup>

In cases of gender reassignment, some scholars have suggested that the constitutionally protected right to travel might be implicated when a state refuses to recognize a valid out-of-state legal gender determination.<sup>42</sup> However, recent case law and legal writing in the United States has focused instead on the FFCC imposed requirement that compels the states to accept other states' determinations of legal gender, either through administrative or court-ordered gender reassignment on a birth certificate for any legal purpose.<sup>43</sup>

This note explores both approaches for gender judgments in Europe: establishing a clear principle of recognition among the EU Member States by adopting a full faith and credit clause and asserting the violation of the right to free movement in preliminary rulings referred to the European Court of Justice (ECJ). While the right to free movement seems to be a surefire approach for civil status claims before the ECJ<sup>44</sup> and as such might be sufficient, establishing the overarching principle of automatic mutual recognition in the EU Constitution would provide regularization of that issue in Europe.

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37. Terry, *supra* note 35, at 3106-07.

38. A court order is preferable for the FFCC protection in case of any legal dispute. COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW §9-2 (2020).

39. *Id.*

40. *Id.*

41. *Id.*

42. Cruz, *supra* note 32, at 53.

43. JOSLIN ET AL., *supra* note 38, at 53.

44. The impairment of the right to free movement has already been established in other civil status aspects, *i.e.*, person's name and marital status, but should now be explicitly affirmed in a gender recognition case. Case C-148/02, *Garcia Avello v. Belgium*, 2003 E.C.R. I-11613 ¶ 24 (Oct. 2, 2003); Case C-353/06, *Grunkin-Paul v. Germany*, 2008 E.C.R. I-07639 ¶ 36 (Oct. 14, 2008).

*B. Adoption of a Full Faith and Credit Clause in Europe for the Benefit of Interstate Gender Recognition.*

The adoption of a full faith and credit clause seems to be the most straightforward solution for automatic mutual recognition of gender judgments in the EU. Scholars have already advocated<sup>45</sup> for an equivalent of the American full faith and credit clause to simplify complex mutual recognition of civil and commercial judgments.<sup>46</sup> However, the preferable methods of adopting a European full faith and credit clause proposed so far<sup>47</sup> do not cover civil status. This might be because the EU Constitution contains applicable provisions referring to civil<sup>48</sup> and criminal<sup>49</sup> judgments, which are followed by the “facilitating” provisions.<sup>50</sup> Civil status is not mentioned in the TFEU, and it has been excluded from subsequent regulations on mutual recognition; interstate gender recognition remains an exclusive domain of the Member States. This part of the note explores different methods of amending the existing legal framework in Europe towards extending the reach of a potential European full faith and credit clause to civil status. There are three main options: a resolution, an amendment to TFEU, and a new judicial interpretation of the TFEU recognition provisions.

A resolution on automatic interstate recognition of civil status, or specifically of legal gender reassignment, that parallels the American full faith and credit clause, would be a relatively easy method of adopting the clause. Apart from the European Parliament and Council enacting the resolution, other conventions and mutual agreements would need to be concurrently repealed.<sup>51</sup> Otherwise, such full faith and credit resolution would only add to the plethora of existing rules and regulations and bilateral or multilateral agreements, which, in practice, translates to unreliable result in local courts and case-by-case adjudication. In civil and commercial judgments, the European Council’s attempts at simplifying the mutual

45. See Agnieszka Frąckowiak-Adamska, *Time for a European “Full Faith and Credit Clause,”* 52 COMMON MKT. L. REV. 191, 193-94 (2015).

46. Because civil and commercial judgments in Europe involve some aspects of marriage (implicating civil status), *e.g.*, property, maintenance, etc., I will discuss solutions offered to simplify the mutual judgments recognition in that area, omitting solutions to problems in recognition and enforcement of criminal judgments. The TFEU separates the mutual recognition into two provisions: Article 81 addresses “judicial cooperation in civil matters” and Article 82 “judicial cooperation in criminal matters.” For clarity of this paper, I will focus on civil matters, which include civil and commercial judgments. TFEU, *supra* note 12, arts. 81-82.

47. See, *e.g.*, Frąckowiak-Adamska, *supra* note 45, at 197.

48. TFEU, *supra* note 12, art. 81(1) (“The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.”).

49. *Id.* art. 82 (“Judicial Cooperation in Criminal Matters”).

50. *Id.* art. 67(4) (“The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”).

51. Steps needed to achieve the result of automatic mutual recognition for gender judgments are based on the analysis for civil and commercial judgments. See Frąckowiak-Adamska, *supra* note 45, at 194.

judgment recognition through independent legal acts, including resolutions, had already resulted in a complex system—difficult to follow even for the practitioners.<sup>52</sup> Thus, the requirement of repealing existing multilateral acts must be considered as a factor that might complicate the solution taking full effect since it would depend in part on the action of individual signatories.

On the other end of the spectrum, an idea but less feasible solution, the EU could “Americanize” the formulation of Articles 81 (civil matters) and 82 (criminal matters) by amending the TFEU to firmly establish the principle of the full faith and credit that must be given to other EU Member States statutes, public records, and court judgments. The text of the TFEU could drop the distinction between “civil”<sup>53</sup> and “criminal,”<sup>54</sup> merging them into one mutual recognition requirement, regardless of the type of judgment or record, so interstate civil status recognition would not be left behind. A resolution would still be needed to make it clear that the revised provision of TFEU now covers interstate gender recognition establishing the EU competence in the area, and to specify the rules of its application and possible narrow exceptions.<sup>55</sup>

A new clause compelling interstate recognition of all judgments and records would be a solution that is the most effective and clear in operation for achieving automatic recognition. The inclusion of an FFCC equivalent that covers civil status in the EU primary law, i.e., the TFEU, will make it clear that the new clause preempts any other existing law or practice. Moreover, when recognition becomes the constituting Treaty principle, the refusal to recognize an out-of-state gender recognition could be narrowly defined.<sup>56</sup> In this scenario, the resolution will serve not to establish a new principle of mutual recognition of civil status judgments, but to set the rules and define exceptions.<sup>57</sup> The latter would be limited to account for mistakes or dysfunctions of legal systems.<sup>58</sup> For example, if the same gender claim was brought in the receiving country earlier than before the foreign court, a review of the foreign judgment by the receiving country court would be warranted.<sup>59</sup> Such formulation would render the recognition of gender

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52. *Id.* at 193.

53. TFEU, *supra* note 12, art. 81 (“Judicial Cooperation in Civil Matters”).

54. *Id.* art. 82 (“Judicial Cooperation in Criminal Matters”).

55. *See generally* Frąckowiak-Adamska, *supra* note 45.

56. *Id.* at 212.

57. *Id.* at 210.

58. *Id.* at 209-10.

59. RZECZNIK PRAW OBYWATELSKICH [OMBUDSMAN], BIULETYN RZECZNIKA PRAW OBYWATELSKICH 2020, No. 2 [BULLETIN OF THE OMBUDSMAN 2020, No. 2], POSTĘPOWANIA W SPRAWACH O USTALENIE PŁCI: PRZEWODNIK DLA SĘDZIÓW I PEŁNOMOCNIKÓW [PROCEEDINGS IN

reassignment judgments not only automatic, but as close to unconditional as possible.

Alternatively, the existing “civil judicial cooperation” provision in Article 81(1) of the TFEU could be given direct effect by a resolution that would mandate not only automatic recognition but would also make clear that civil status, and with that gender, judgments, belong to the “civil matters” covered by the Article. The enactment would also need to repeal all other existing rules on recognition of civil status judgments.

The process of amending the Treaty on the Functioning of the European Union, however, is not trivial. Since shifting the competence to the European Union from the Member States in the interstate gender recognition is a “key change” it would be subject to “ordinary revision.”<sup>60</sup> The process of such revision requires an intergovernmental conference to adopt the proposal for amendment by consensus.<sup>61</sup> While this is still feasible, the requirement of ratification by *all* EU countries is not, especially because so far member states have not shown interest in harmonizing their legislation in the area.<sup>62</sup> Another wrinkle is the general opt-out by Denmark and Ireland, and their occasional participation in certain acts,<sup>63</sup> which proves the point of unlikely unanimous ratification of the treaty revision.

Based on the specific needs of the area of interstate gender recognition, the most desirable solution seems to be the automatic and nearly unconditional recognition introduced by the new mutual recognition clause, paralleling the American Full Faith and Credit Clause. The new recognition framework would be further developed in a resolution establishing specific rules and defining narrow exceptions.

The functioning of the new recognition principle could also be reinforced by a decision of the ECJ. Since it might also be the most unattainable goal, the explicit inclusion of civil status in the already existing provision in the TFEU on the mutual civil judgments’ recognition is the next preferable solution.

Lastly, it is worth mentioning, that some recognition and enforcement efforts were undertaken by conventions.<sup>64</sup> This note does not explore this approach for achieving the FFCC-like automatic interstate gender recognition, because it has insufficient binding force. Unless a convention is transformed into a regulation, its effect is binding only on countries who

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60. *Revision of the Treaties*, EUR-LEX, [https://eur-lex.europa.eu/summary/glossary/treaties\\_revision.html](https://eur-lex.europa.eu/summary/glossary/treaties_revision.html) (last visited Jan. 26, 2022).

61. *Id.*

62. *Civil Status Documents*, *supra* note 11, at 8.

63. See Frąckowiak-Adamska, *supra* note 45, at 213.

64. Jan-Jaap Kuipers, *Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party’s Autonomy in Private Law*, 2 EUR. J. LEGAL STUD. 66 (2009).

signed it, and more importantly, ratified it.<sup>65</sup> This may be only a fraction of the EU Member States.

### C. *The Public Policy Exception*

In the United States, a state can refuse to enforce a foreign judgment when it clashes with the local values,<sup>66</sup> citing the public policy exception to the Full Faith and Credit Clause. Debate continues whether, in the name of a unified federal system, the clause should instead preclude the possibility of the dominance of the single state's interest in preserving its own policies.<sup>67</sup> Another argument is that public policy is too vague and all-encompassing to allow the states to use it as a justification for rejecting a judgment from another state.<sup>68</sup> Nevertheless, regardless of the perceived shortcomings, the exception must be addressed when discussing the Full Faith and Credit Clause.

It seems that the EU may fare significantly better in narrowing the interpretation of its constitutional public policy exception. The TFEU contains an express public policy, public security, and public health provision in Article 52, in the chapter addressing the right of establishment as an integral part of the free movement of persons, services, and capital.<sup>69</sup> The exception allows for "special treatment" of the foreign nationals on the aforementioned grounds and could consequently limit the freedom of movement.<sup>70</sup> However, the ECJ has ruled on numerous occasions that the public policy may only be invoked when there is a "genuine and sufficiently serious threat" to "one of the fundamental interests of society,"<sup>71</sup> and as a "derogation from a fundamental principle of the Treaty," must be narrowly construed.<sup>72</sup> Further, the application of the public policy provision may amount to indirect discrimination on the grounds of nationality, which is

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65. See generally Frackowiak-Adamska, *supra* note 45.

66. Elizabeth Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 655 (2013).

67. Terry, *supra* note 35, at 3107.

68. *Id.*

69. TFEU, *supra* note 12, art. 52.

70. *Id.*

71. The exception was justified when there was a crisis in the oil, telecommunication, and electricity sectors in the member state or there was a threat of a serious harm to the social security system, or when it was necessary to the survival of the population, but it can never be applied on purely economic grounds. None of those reasons may be conceivably present in the legal gender recognition scenario. *European Commission, Guide to the Case Law of the European Court of Justice on Articles 49 et seq. TFEU, Freedom of Establishment*, at 15, COM (2017) 1839123 final (June 4, 2003).

72. *Id.*

expressly prohibited by TFEU.<sup>73</sup> Theoretically, a receiving country could not refuse to make necessary adjustments in a birth certificate based on a gender recognition judgment from another Member State, when such changes could be made based on a domestic court order, citing the public policy exception.

Moreover, the *Coman* court specifically, when mandating a Member State to recognize a foreign same-sex marriage for purposes of granting residency to the non-citizen spouse, explicitly dismissed the public policy justification in case of marriage where potentially such “safety valve” could be more needed.<sup>74</sup> Marriage creates new rights for other people, including children. Gender recognition, on the other hand, is a distinctively individual right to self-determination and self-expression. It affects other people, but not directly, like marriage. Therefore, looking out for other members of the society as the basis for public policy justification for obstructing a fundamental right of the EU would unlikely be a persuasive argument for rejecting an out-of-state gender reassignment judgment.

Similarly, in cases addressing the interstate recognition of legal names,<sup>75</sup> the ECJ recognized the supremacy of the fundamental freedoms guaranteed by the TFEU—in particular, those involving the right to move and reside in the territory of the Member States—over local interest. The court ruled<sup>76</sup> that the refusal to register the name obtained in another state, which conflicts with the rules of the receiving state, creates an inconvenience that would inhibit the right to free movement and that cannot be justified by an overriding public policy.<sup>77</sup>

What seems to impair the full benefit of the Full Faith and Credit Clause protection in the area of marriage and gender recognition in the United States does not then appear as such in the European context. If invoking local public policy was not a sufficient basis for not recognizing a valid same-sex marriage from another jurisdiction in *Coman*, it will likely not stand in the way of recognizing legal gender reassignment in the EU.

The particular judgment reconfirming gender should be final and reviewable only if there is a mistake. For example, if the same petition was brought in the receiving state’s court earlier than before the foreign court. The review of the out-of-state gender recognition judgment may also be desired when a foreign court issues a judgment contrary to the person’s lived gender.<sup>78</sup> The finality of that judgment would strip the person of ever having a possibility of obtaining legal recognition of their gender; it would force someone to live with the disastrous consequences of the unfavorable judgment even in a more gender-friendly state.<sup>79</sup> But those instances are rare

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73. *Id.* at 58.

74. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385 ¶¶ 45-46 (June 5, 2018).

75. C-148/02, *Garcia Avello v. Belgium*, 2003 E.C.R. I-11613 ¶ 42 (Oct. 2, 2003).

76. Case C-353/06, *Grunkin-Paul v. Germany*, 2008 E.C.R. I-7675 (Oct. 14, 2008).

77. Kuipers, *supra* note 64, at 83.

78. Cruz, *supra* note 32, at 54.

79. *Id.*

and could be remedied with the possibility of reconfirming one's gender through a new proceeding. Gender is fluid throughout life<sup>80</sup> anyway so a quick and easily accessible legal procedure should allow for the new legal reassignment of gender at any point. Thus, the finality of the initial unfavorable out-of-state judgment would not preclude the petitioner from the possibility of obtaining a new legal gender reassignment in the receiving state.

The American Full Faith and Credit Clause comes with the public policy exception that may allow an unwilling receiving state to get out of its mutual recognition obligation. The EU constituting treaty has an express provision to a similar effect. In the EU, however, the narrow interpretation of the public policy exception and its explicit preclusion in case law in the civil status area, addressing interstate recognition of names and same-sex marriage, substantially minimizes this potential drawback.

### III. SUPPLEMENTARY APPROACH: *COMAN V. ROMANIA*

#### A. *What Coman has Achieved.*

Relu Coman, a Romanian and American citizen, met Robert Hamilton, an American, in New York. They lived together for four years in the United States, before Coman decided to relocate to Brussels, Belgium, to work in the European Parliament. Hamilton stayed in New York. The couple got married in Brussels in 2010. In 2013, they inquired about the possibility of moving to Romania, where Hamilton would require a resident permit to be able to stay there longer than three months. He was entitled to a derived right of residence in Romania on the grounds of his marriage to a Romanian citizen, but his application was denied because his same-sex marriage was not recognized in Romania.<sup>81</sup>

Coman and Hamilton challenged the decision in the local court alleging discrimination on based on sexual orientation, infringing on their right to free movement in the EU.<sup>82</sup> They argued that the Romanian law prohibiting same-sex marriage violates the Romanian Constitution's provisions that protect "the right to personal life, family life and private life and . . . the principle of equality."<sup>83</sup> The matter reached the Romanian Constitutional Court. The Court had doubts on the interpretation of the conflicting EU law and referred

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80. QUINN, *supra* note 27, at 23.

81. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385 ¶¶ 9–12 (June 5, 2018).

82. *Id.* ¶ 13.

83. *Id.*

the questions on the meaning of the term “spouse” and the resulting obligation to grant the right of residence to the ECJ.<sup>84</sup>

The ECJ held that Romania must recognize a valid foreign same-sex marriage, even where same-sex marriage is not legal, for the purposes of granting the non-resident spouse a permit to reside in that country.<sup>85</sup> The court interpreted the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States<sup>86</sup> and how it relates to the protection of private and family life.<sup>87</sup> It concluded that the Member States may enjoy their competencies in regulating marriage, but they cannot obstruct the exercise of the fundamental rights on the ground that the law of that Member State does not recognize same-sex marriage.<sup>88</sup>

The ECJ explicitly rejected the public policy justification for unilateral interpretation of a fundamental freedom by a Member State.<sup>89</sup> The exception may be relied upon only if there is a “genuine and sufficiently serious threat to a fundamental interest of the society.”<sup>90</sup> Absent such a threat in this case, the prohibition of same-sex marriage in the receiving state did not justify non-recognition of the valid marriage contracted in another Member State when the non-recognition would impede the right to free movement and residence within the EU.<sup>91</sup>

In addressing same-sex marriage, the court made a point relevant to interstate gender recognition. It acknowledged “the right to lead a normal family life, together with their family members” in both the member state where the marriage was contracted and in the Member State to which the citizens return with the valid marriage certificate.<sup>92</sup> Like marriage, legal gender recognition often affects family life, including spousal and parental rights.<sup>93</sup>

*Coman* could have made the case for interstate recognition of civil status even stronger had the ECJ addressed not only freedom of movement and the respect for private and family life, but also the principle of non-discrimination based on sexual orientation and gender.<sup>94</sup> The court,

84. Council Directive 2004/38, art. 2, 2004 O.J. (L 158) 47 (EU); Charter of Fundamental Rights of the Eur. Union, arts. 7, 8, 21, 45, 2012 O.J. (C 326) 55.

85. *Coman*, Case C-673/16, ¶ 51.

86. Council Directive 2004/38, 2004 O.J. (L 158) 47 (EU); TFEU, *supra* note 12, art. 21.

87. *Coman*, Case C-673/16, ¶ 48.

88. *Id.* ¶¶ 42, 46, 51.

89. *Id.* ¶¶ 42-46.

90. *Id.* ¶ 44.

91. *Id.* ¶¶ 46, 51.

92. *Id.* ¶ 32.

93. *Id.* ¶ 50.

94. While there is no provision in the EU law that explicitly prohibit gender identity discrimination, the Chart of the Fundamental Rights of the European union prohibit discrimination. The ECJ has found that discrimination based on past or future “gender reassignment” may amount to sex discrimination, which is explicitly prohibited in several EU

interestingly, ignored that argument even though discrimination on the basis of sexual orientation was raised in the original proceedings.<sup>95</sup> However, the focus on the interstate aspect of civil status judgment recognition can hardly be considered *Coman*'s weakness for the purposes of interstate gender recognition. Its reasoning offers the strongest analogy. Other civil status cases<sup>96</sup> may be used to support the argument of discrimination on the grounds of both nationality and gender, if needed.<sup>97</sup>

### B. Strategic Litigation

After cases covering interstate recognition of legal names, *Coman* tackled recognition of another component of European civil status—marriage. The path now seems well-paved to a judgment that will announce that although gender belongs to the Member States' exclusive competence, non-recognition of an out-of-state gender reassignment judgment violates the EU fundamental principles that take precedence over a Member State's law, and its public policy may not be used for justification. If a full faith and credit clause is adopted, the verdict could also interpret the new TFEU provision or resolution when it refers to gender judgments. The EU court ruling could establish that mutual recognition mandated by the clause is automatic and nearly unconditional.

So far, neither the ECJ nor the European Court of Human Rights (ECtHR) has addressed interstate gender recognition. In the area of civil status, the ECJ has held that although marriage and names belong to the exclusive competence of the Member States, the EU fundamental right of freedom of movement and respect for private and family life takes

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directives. Also, the European Court of Human Rights has found states in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms when transgender citizens were banned from seeking legal recognition of their gender. See AMNESTY INT'L, THE STATE DECIDES WHO I AM: LACK OF LEGAL GENDER RECOGNITION FOR TRANSGENDER PEOPLE IN EUROPE 20 (2014).

95. Manon Beury, *The CJEU's Judgment in Coman: A Small Step for the Recognition of Same-Sex Couples Underlying European Divides over LGBT Rights*, STRASBOURG OBSERVERS (July 24, 2018), <https://strasbourgobservers.com/2018/07/24/the-cjeus-judgment-in-coman-a-small-step-for-the-recognition-of-same-sex-couples-underlying-european-divides-over-lgbt-rights/>.

96. See, e.g., Case C-267/06, *Maruko v. Versorgungsanstalt der Deutschen Bühnen*, ECLI:EU:C:2008:179 ¶ 37 (Apr. 1, 2008) (challenging Germany's refusal to recognize same-sex marriage, the court admits that even though civil status falls within the competence of the member states, the principle of non-discrimination in the EU law, like other EU fundamental rights, may not be violated).

97. See Cruz, *supra* note 32, at 54 (equal protection of the laws not available to transgender people when questioning their lived gender while accepting the lived gender of cisgender people, constitutes one of the constitutional arguments raised by scholars and litigants in the United States).

precedence.<sup>98</sup> The interstate gender recognition case should be decided by the ECJ to reaffirm those principles specifically in the gender area.

Due to its binding force, an ECJ's verdict would be preferable to an ECtHR decision.<sup>99</sup> The Member States must comply with the latter but only if they are parties to the dispute.<sup>100</sup> A failure to comply may have some consequences (the court does monitor compliance with its judgment and progress in implementing the orders), but the verdict is not binding in any way on non-parties.<sup>101</sup> In the absence of such obligation, other local courts may be reluctant to follow the judgment to avoid charges of overreaching.<sup>102</sup> Another reason why the ECJ is a proper venue is that strategic litigation could supplement a full faith and credit clause preferably included in the TFEU or enacted in the EU primary law. The ECJ is the appropriate court to interpret the new provision and foreclose the possibility of a public policy pathway to non-recognition of a gender judgment from another Member State.<sup>103</sup>

The ECJ could mandate the EU Member States to mutually recognize valid gender reassignments mirroring the *Coman* decision, regardless of the receiving state's conflicting policies. Just like in *Coman*, the fact that same-sex marriages are not valid in Romania could not preclude local recognition of such marriage validly contracted in another EU Member State. In the case of interstate gender recognition, different requirements for legal gender reassignment in the receiving state, cannot invalidate a valid gender reassignment from another Member State. The issue can be formulated on the same legal grounds, the same rights are implicated—freedom of movement and residence and continuation of family life that has been created or strengthened in another Member State—and similar reasoning would apply. Like with marriage, the states will retain their competence to regulate legal gender recognition in their territory. But the court, by asserting that that competence is subordinate to the EU fundamental right of freedom of movement and residence, would force the states to mutually recognize gender reassignment from another Member State.

Moreover, like in *Coman*, the two justifications for non-recognition of out-of-state gender judgments should be explicitly rejected: the excuse of the

98. *Coman*, Case C-673/16, ¶¶ 45–46; *Garcia*, Case C-148/02, I-11649-1-11650; *Grunkin-Paul*, Case C-353/06, I-7675.

99. Gundega Mikelstone, *The Binding Force of the Case Law of the Court of Justice of the European Union*, 20 JURISPRUDENCIA 469, 473 (2013).

100. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. FOUND. 77, 77-78 (2014).

101. *Id.* at 81.

102. *Id.*

103. The ECtHR opinions are not as impactful, but helpful. The ECJ adopts the ECtHR judgments as persuasive authority in its reasoning. In civil status cases, the Article 8 right to respect for private and family life of the European Convention on Human Rights is implicated since gender, like name, is a means of personal identification and a link to family, in the court's opinion. Likewise, in *Coman*, the ECtHR caselaw related to private and family life also supported the court's judgment. See Beury, *supra* note 95.

interpretation of the EU law and public policy exception. In *Coman*, the court repeated the doctrine that the EU must respect the Member States' national identity "inherent in their fundamental structures, both political and constitutional," however, it denied the states the freedom to unilaterally interpret the fundamental rights of the EU without any control by the EU institutions.<sup>104</sup> The ECJ should also expressly reject the public policy justification for refusing to recognize judgments from another EU jurisdiction. Following *Coman*'s dictum, it should not matter that a judgment from another Member State does not comply with the local requirements for legal gender reassignment, because its recognition does not pose a "sufficiently serious threat to a fundamental interest of the society."<sup>105</sup>

Procedurally, it is the national court of the Member State that makes a reference for a preliminary ruling to the European Court of Justice.<sup>106</sup> The court submits a question about the interpretation of a provision of the EU law<sup>107</sup> usually to ascertain that the national legislation complies with that law.<sup>108</sup> It may also seek a review of the validity of the EU law.<sup>109</sup> NGOs and LGBT organizations, like ILGA-Europe, can help to publicize the availability of the legal recourse or to pressure the courts to refer questions in the area of interstate gender recognition to the ECJ.

### C. *Erga Omnes* Effects

Additionally, the area of gender recognition would also benefit from *erga omnes* effects of the ECJ decision that would mandate unconditional recognition of an out-of-state gender reassignment.<sup>110</sup> The influence of the international courts' judgments often extends beyond the litigants in a particular dispute,<sup>111</sup> especially with national and international media

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104. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385 ¶ 43 (June 5, 2018).

105. *Id.* ¶ 44.

106. Court of Justice, *Court of Justice of the European Union*, CURIA, [https://curia.europa.eu/jcms/jcms/Jo2\\_7024/en/](https://curia.europa.eu/jcms/jcms/Jo2_7024/en/).

107. In *Coman*, the Romanian Constitutional Court asked the ECJ for interpretation of the term "spouse" in the EU Directive. Beury, *supra* note 95. It is surprising that Romanian court would ask for a preliminary ruling on the subject of same-sex marriage, giving the conservative political and religious majority in the country and rejection of two bills on same-sex couples legal recognition by the Romanian parliament. See Constantin Cojocariu, *Same-Sex Marriage Before the Courts and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania*, VERFBLOG (Jan. 25, 2017), <https://verfassungsblog.de/same-sex-marriage-before-the-courts-and-before-the-people-the-story-of-a-tumultuous-year-for-lgbt-rights-in-romania/>.

108. Court of Justice, *supra* note 106.

109. *Id.*

110. Helfer & Voeten, *supra* note 100, at 15.

111. *Id.* at 2.

coverage. The judgment may help overcome opposition to a particular policy change resulting from the political process.<sup>112</sup> It would help shape social attitudes by influencing domestic courts, executives, and international organizations. On the most practical level, the legal practitioners will be able to use the reasoning in their argument before the courts.<sup>113</sup> A judgment compelling mutual recognition in the area of gender could potentially bring awareness and changes not only in the interstate recognition of gender reassignment, but also in national requirements for legal gender reassignment, moving towards uniform self-determination model and eliminating medical and procedural hurdles in all EU Member States.

Taking *Coman* as an example, commentators admit that its verdict is an important counterweight to the recent rise of bans on same-sex marriages in the EU.<sup>114</sup> Potential effects of the outcome of the case extend beyond the grant of residency to Mr. Hamilton, as evidenced by the amount of *amicus curiae* briefs submitted by European and international organizations.<sup>115</sup> ILGA-Europe explains that the case has an “immensely positive impact not only for couples in Romania, but all over the EU.”<sup>116</sup> Now, the European Commission may launch an infringement procedure against any noncompliant Member State.<sup>117</sup> The pressure from the European institutions will hopefully eventually ensure more equality and inclusion for the LGBTQ community in the EU countries. The ECJ’s clarification in *Coman* that the term “spouse” is gender-neutral<sup>118</sup> is helpful in raising awareness and initiating a public discourse about gender and its implications.

Although the shift towards the equality of rights may not be immediate, the aftermath of the *Coman*’s decision in Romania shows that the ECJ judgment may give rise to a heated public debate on the issues raised before the court. Fearing possible pressure from the EU institutions to legalize same-sex marriage, a coalition of religious and conservative NGOs launched a national campaign to include the definition of marriage as a union between a man and a woman in the Romanian Constitution.<sup>119</sup> The constitutional court did not amend the Constitution but clarified the interpretation of the Constitution, reaffirming that same-sex marriage is not included in the meaning of marriage. Nevertheless, addressing the issue raised awareness about the problems of the marginalized groups and mobilized local support organizations and the LGBTQ community.<sup>120</sup>

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112. *Id.* at 3.

113. *Id.* at 4.

114. Beury, *supra* note 95.

115. *Id.*

116. *Id.*

117. Avetisyan & Teoh, *supra* note 21.

118. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385 ¶ 35 (June 5, 2018).

119. Cojocariu, *supra* note 107.

120. *Id.*

## IV. CONCLUSION

“Obviously, one cannot be required to maintain two different identities.”<sup>121</sup>

Paradoxically, civil status (including gender recognition), an area where the Member States of the European Union are given most freedom, is the area where uniformity, at least in terms of automatic and unconditional judgment recognition, is most desired. Practical inconveniences in accessing the job market, healthcare, financial services, or travel amount to undue burden. Gender, as well as name and marital status define and express a person’s identity. As declared in the Yogyakarta Principles + 10, it is an obligation of the states to ensure free exercise of the right to legal recognition and to bodily and mental integrity, among other international human rights.<sup>122</sup>

To fill the legal void in the interstate gender recognition in the EU, first, a full faith and credit clause should be adopted to compel automatic mutual recognition. The clause’s mandate would protect the individuals from uncertainty, confusion, and delay that result from the reexamination of judgments from another state.<sup>123</sup> The ECJ could then reinforce the principle of automatic and almost unconditional recognition of gender judgments from another Member State.

In the case of legal names and marital status, the ECJ has already declared that the inconvenience caused by the Member States’ refusal to recognize the out-of-state judgment cannot inhibit the EU’s fundamental right of freedom of movement and residence. Time for gender. After the long-awaited,<sup>124</sup> most recent *Coman* decision, same-sex marriage from another EU jurisdiction must be recognized in the EU Member State that has not legalized such unions.<sup>125</sup> A case addressing mutual gender recognition would maintain momentum for LGBTQ people’s rights beyond the interstate gender status recognition.

Automatic gender recognition obtained in another EU Member State is a small step towards protecting transgender people’s rights. It is much needed and may even be feasible, given the priorities in the EU LGBTIQ Equality Strategy 2020-2025.<sup>126</sup> Accessible self-determination—with no age, marital status, and other invasive or not, procedural barriers—in all EU Member

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121. Kuipers, *supra* note 64, at 15.

122. *Yogyakarta Principles + 10*, *supra* note 4, at 10.

123. Terry, *supra* note 35, at 3107.

124. Frackowiak-Adamska, *supra* note 45.

125. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385 ¶ 36 (June 5, 2018).

126. *2020-25 Strategy*, *supra* note 8.

States is the ultimate goal, but its achievement might have to wait until the wave of the conservative shift in some of the EU countries recedes.