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Competences of the "Union" and Sex Equality: A Comparative Look at the European Union and the United States

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COMPETENCES OF THE "UNION" AND SEX EQUALITY: A COMPARATIVE LOOK AT THE EUROPEAN UNION AND THE UNITED STATES

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The delivery of substantive sex equality guarantees in the European Union and the United States is substantially affected by the division of powers ("competences" in European terminology) between the constituent units and the center. This Commentary compares the technical similarities and differences between the structures of competence of the federal systems of the United States and the European Union. This Commentary also briefly sketches their impact on substantive sex equality law.

I. Introduction to Sex Equality Law in the United States and European Union

United States

United States equality law developed principally as a reaction to slavery, segregation, and discrimination against African-Americans and other racial groups. At its base stood the 1868 Fourteenth Amendment Equal Protection Clause binding the states, and the 1791 Due Process Clause of the Fifth Amendment binding the Union. Both of these constitutional provisions, although not explicitly referring to protected grounds, have been interpreted to guarantee equality on the basis of sex.

Federal statutes further guarantee specific sex equality rights. Notably, Title VII of the 1964 Civil Rights Act prohibits employment discrimination, and Title IX of the 1972 Education Amendments prohibits sex discrimination in education. Further statutory guarantees include equal pay, treatment in housing, education, and credit opportunities.

European Union

While the center in the United States is responsible for both the economy (in terms of creating a single market between the states) and the protection of human rights, the European divided-power system has two

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centers—the European Communities/European Union ("EC/EU") and the Council of Europe. The European Communities' ("EC") primary purpose is economic integration, whereas the Council of Europe protects human rights. In the latter system, the European Convention on Human Rights contains a sex equality guarantee that is guarded by the European Court of Human Rights. The EC, on the other hand, began its history of sex equality law with an economically motivated equal pay provision (Article 119; today 141 of the EC Treaty ("TEC")). Race equality entered into the *acquis communautaire*, the total body of EC law, only four decades later.

Today, sex equality is seen as a fundamental right with constitutional status as a result of the case-law of the European Court of Justice ("ECJ"). At the statutory level (secondary law), the EC has passed nine original directives implementing the principle of equality between men and women in the areas of employment, occupation, social security, and access to goods and services. These directives contain equality guarantees (e.g., equal treatment in access to employment or equal pay) as well as special rights (e.g., pregnancy protection and maternity leave). The EC guarantees are comparatively very generous. Unlike in the United States, the European law protects transsexuals and homosexuals from discrimination, applies equal worth analysis in equal pay cases, shifts the burden of proof to the defendant for production and persuasion, and provides abundant special labor and social rights connected to pregnancy and parenthood.

II. How Legislative Competences Have Been Construed

United States

The two most important legal bases for federal legislation on equality have been the Fourteenth Amendment and the Commerce Clause. Congress passed Title VII under its Commerce Clause authority, and Title IX under the Spending Clause. An Equal Rights Amendment ("ERA") to the Constitution, adopted by both houses of Congress in the early 1970s, would have given Congress the "power to enforce" equal rights on account of sex. However, by 1982, the effort to ratify the ERA had failed.

Both the Fourteenth Amendment and the Commerce Clause were used to adopt the Violence Against Women Act ("VAWA"). However, in *United States v. Morrison*, the Supreme Court declared the provisions of VAWA providing for civil remedies in federal courts unconstitutional. In refusing the Fourteenth Amendment as a legal basis for the provisions, the Court argued that the amendment historically "erect[ed] no shield against merely private conduct," but prohibited only the actions of states. Under the Commerce Clause, the Court denied that domestic violence had an economic effect, notwithstanding the massive congressional record evidencing the impact of gender-based violence on women's economic opportunities. Seeing sex-based violence as a traditional, criminal law prerogative of the states, the Court concluded it should continue to be governed at the local level.

From an outside perspective, then, it is surprising to find the heterosexist definition of "spouse" and "marriage" regulated at the federal level, given that family law is a prerogative of the states and at the core of the "private." The legal basis for the 1996 Defense of Marriage Act was the Full Faith and Credit Clause—the power to regulate recognition of other States' acts. While it is doubtful that this power extends to the definition of marriage for purposes of federal law, the Supreme Court has so far chosen not to review its constitutionality.

European Union

The European Communities' central legislator has used several legal bases for equality legislation in the past four decades. The counterpart of the Interstate Commerce Clause in the EC Treaty (Article 100; today 94) was used in conjunction with either the substantive equal pay Article 119 (today 141) or the "residual power" Article 235 (today 308). Other bases included Article 118a of TEC concerning the health and safety of workers, and the Agreement on Social Policy.

The list of competences changed dramatically following the insertion of Article 13 by the Amsterdam Treaty in 1997. This empowered the center to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. However, the center could only act "within the limits of the powers conferred by . . . [the Treaty] upon the Community." Article 13 is a simple competence provision—it does not actually contain a substantive constitutional guarantee. Unlike the United States, where federal statutes further implement the rights guaranteed by the Federal Constitution, the European central legislator mostly creates these rights in secondary legislation.

The use of EC competences has never been challenged before the ECJ. The reason for this lies, primarily, in the fact that the Community legislator has limited itself to clear economic issues. The use of existing EC competences for the adoption of binding legislation addressing domestic violence is unlikely at this time.

III. Legal Instruments

United States

In the United States, federal equality guarantees are contained in the Constitution and statutes. They can also be found in executive orders (e.g., affirmative action) and regulations of federal agencies, such as the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC regulations are generally not considered binding as judicial deference toward them varies. These instruments provide three levels of equality protection in terms of addressees: the federal government (by virtue of the Fifth Amendment), the states (through the Fourteenth Amendment) and individuals directly (through the Civil Rights Act).

European Union

The European Union also recognizes a constitutional principle of non-discrimination on the basis of sex. Its primary addressee is the center, which is bound by this principle in all of its areas of competence. The Member States, however, are only bound "within the scope of Community law," due to the non-existence of an all-encompassing bill of rights binding the constituent units, The circumscription of the EC's competence is thus reflected in the sex equality guarantee's scope in the Member States in a way that does not exist in the United States. Naturally, the Member States may have their own sex equality guarantees, but these vary.

The principle of equal pay (Article 141), even though contained in the Treaty, is not generally considered a constitutional principle. It does, however, bind the Member States (to whom it was addressed in the first place), as it has what is called a "vertical direct effect." It is also directly effective in horizontal relationships, as it binds private actors within the Member States.

In terms of secondary legislation in the area of sex equality, the EC regulates by directives. Directives are an instrument of "commandeering," whereby the center issues binding commands that force constituent units to legislate with respect to private parties. Such an instrument does not have an equivalent in the United States system. Directives cannot bind individuals the same way federal statutes do. Individuals are only bound by provisions of national law that transpose them. Thus, unity of the protection in EC equality law is lower than with federal statutes in the United States. The transposing national provisions are implanted into a web of existing norms, so that the actual protection can differ. This is particularly so with procedural law, and it impacts, for example, the effectiveness of the Burden of Proof Directive. Some questions are also explicitly left to the discretion of the Member States—references to "national legislation or practice" abound. The Council, or the European Parliament, may also issue non-binding recommendations, and have done so on such issues as political representation, dignity at the workplace, or positive action.

Thus, the EC system also contains three levels of sex equality protection: the center binds itself (case-law based fundamental right), the states (the fundamental right in implementing EC law; Article 141 and the directives), and individuals (both directly by virtue of Article 141's horizontal direct effect, and by national law implementing the directives).

IV. COURTS

United States

The aforementioned is mirrored in the jurisdiction of the federal courts. Given the existence of a constitutional guarantee, constitutional questions of sex equality before the federal courts arise in a wide range of substantive areas including reproduction, family, some issues involving Indian Reserva-

tions, and, on occasion, rape. The federal courts also adjudicate Title VII and Title IX.

European Union

Before the ECJ, only one case, *Rinke v. Arztekammer Hamburg*, has addressed the constitutionality of non-equality central legislation on the basis of its potential conflict with the EC principle of sex equality. Without an all-encompassing guarantee, some questions never arise before the ECJ (or when they do, they are not considered EC/EU matters). Such questions include reproductive rights, gender-based violence, and political representation. Questions like these, admittedly, arise before the European Court of Human Rights, which has dealt with broader issues of sex equality (i.e., domestic violence, rape, prostitution, veiling, etc.) under various human rights rubrics.

Furthermore, most questions concerning sex equality law arrive at the ECJ as preliminary questions from the national courts. Under this procedure, the ECJ examines the validity and interpretation of EC law only. This provides the national courts rather abstract, generalized interpretations of the EC provisions. In many cases, the central questions regarding sex equality remain unanswered by the ECJ because they would not be considered a matter of EC law, and are thus left to national courts. This is true not only of technical issues (such as temporal rules or the conduct of fact-finding) but also of many questions central to implementing sex equality, such as acceptable justifications for prima facie indirectly discriminatory measures (disparate impact).

V. Discussion and Conclusions

Explicit competence-creation on sex equality questions has happened much faster in the European Union than in the United States. It should, however, be pointed out that the EC/EU competence provisions require unanimity for the adoption of directives, which means Member States de facto keep equality law in their control (through their representatives in the Council). Furthermore, the secondary legislation resulting from the use of Article 94 TEC has been meek compared to, for example, the VAWA, as it only touches on obvious, market-relevant areas. The competence provision of Article 13 TEC is limited to existing EC powers. A stretch in interpretation of this competence into intra-state sex equality issues, such as gender-based violence, will likely not occur any time soon.

Seeing the failed ERA and the *Morrison* decision in the United States, one might conclude that more has remained with the states than the U.S. federal government, and that the European Union might soon overtake the United States. Yet because of the existence of an all-encompassing principle of equality enshrined in the U.S. Constitution, the potential for federal action will be greater in the United States until the EC/EU adopts a similar provision (which again seems unlikely). Also, the use of directives and the

limited judicial review powers of the ECJ might restrain some of the central competence in the EC/EU. This leaves much to be decided at the Member State level and leads to lower levels of unity across the European Union.

A future development to watch is the Lisbon Treaty, which strengthens the European Union's competence to fight cross-border crime by enabling it to adopt directives to battle "trafficking in human beings and sexual exploitation of women and children." It is in this area of interstate criminal cooperation (but not intrastate, non-economic issues) that the European Union might outdo the United States in upcoming years.