

Anti-discrimination Law in the Global Age¹

Le droit de la non-discrimination à l'ère de la mondialisation

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Abstract

This article argues that the traditional segregated approach to anti-discrimination law, which studies different courts and legal orders in isolation from one another, no longer provides adequate conceptual and normative tools to fully grasp the current evolutions and challenges in this domain. Instead, there is a genuine need for a global approach to anti-discrimination law in which comparative law plays a central role.

Résumé

Partant du constat que l'approche traditionnelle, qui consiste à analyser les ordres juridiques de manière compartimentée, ne permet pas d'appréhender adéquatement les évolutions contemporaines du droit de la non-discrimination et les défis auxquels il est confronté, cette contribution propose une approche globale dans laquelle le droit comparé joue un rôle central.

In legal philosophy, the concept of equality can be traced back to antiquity. Equality clauses more specifically have also been part of modern constitutions for centuries now. However, what is nowadays called 'anti-discrimination law' (or 'non-discrimination law') has in many countries only developed fairly recently.

In Europe, the right to equality and anti-discrimination rights have expanded remarkably over the last fifteen years and most notably since the entry into force of the Lisbon Treaty and of the Charter of Fundamental Rights. For once, European Union law has been the driving force behind this evolution. Both normative EU instruments such as EU directives and judgments handed down by the European Court of Justice (ECJ) have been instrumental in this development.² This, however, is not merely a top-down process. US anti-discrimination law has also been quite influential in the drafting of the EU anti-discrimination directives and in some landmark cases of the ECJ, notably through the mediation of UK law.³

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² M. BELL, "The Principle of Equal Treatment: Widening and Deepening", in P. CRAIG and G. DE BURCA (eds), *The Evolution of EU law*, Oxford, OUP, 2011, 2nd ed., p. 611-639.

³ D. SCHIECK, L. WADDINGTON & M. BELL (eds), *Non-Discrimination Law*, Oxford & Portland, Hart Publishing, Ius Commune Casebooks for the Common Law of Europe, 2007, p. 1-26; M. BELL, *Anti-discrimination Law and the Euro-*

Over the last decade, the European Court of Human Rights (ECtHR) has also performed a more systematic control of the non-discrimination principle that is enshrined in article 14 of the Convention.⁴ In doing so, it has often been inspired by the case law of the ECJ. Influences can also be found outside Europe and include decisions of the relevant UN treaty bodies, the case law of the Inter-American Court of Human Rights and domestic rulings adopted by courts in both Members States and third States such as Canada, South Africa and the US.

This highly intertwined dynamic does not only account for the evolutions in the European context, but is also relevant for explaining the developments that are taking place in other legal regimes. Indeed, on a global level, human rights bodies that guarantee the protection of anti-discrimination rights mutually affect each other.⁵

The starting point of the special issue is therefore the observation of multiple and overlapping sources in equality law and a diversification of the actors which shape the right to non-discrimination, which often and increasingly operate transnationally. To answer the question of how we should reflect on this phenomenon so as to fully grasp the cases and issues in discrimination, a conference was held at the Université libre de Bruxelles (ULB) in May 2014.⁶ Four broad themes were addressed, namely boundaries, stereotypes, intersectionality, as well as the implementation and effectiveness of anti-discrimination law. This special issue of the European Journal of Human Rights, dedicated to the “Global Challenges of Equality Law”, gathers three major papers presented at this conference which follow a transnational and comparative approach.

The analysis of Marzia Barbera and Venera Protopapa on the *Fiat* case⁷ unveils how a major industry trade dispute was reframed in the language of anti-discrimination law. The authors argue that this case of strategic litigation, which engaged legal authorities from the US, the UK and Italy, could be seen “as a locus where, instead of identities rooted in the workplace, new social identities, linked to personal characteristics, have emerged and been expressed through the plaintiff’s and court’s narratives”.

Taking into account the multi-layered nature of non-discrimination law, Lisa Waddington makes use of a comparative perspective to assess the effectiveness of the anti-discrimination corpus when the rights of people with disabilities are

pean Union, Oxford, OUP, 2002, p. 148 & sq.; G. DE BURCA, “The Trajectories of European and American Antidiscrimination Law”, *American Journal of Comparative Law*, vol. 60, Symposium issue no. 1, 2012, p. 11-13.

⁴ O. M. ARNARDOTTIR, *Equality and Non-Discrimination Under the European Convention on Human Rights*, The Hague, Martinus Nijhoff, 2003, p. 41 & sq.; F. TULKENS, “L'évolution du principe de non-discrimination à la lumière de la jurisprudence de la Cour européenne des droits de l'homme”, in J.-Y. CARLIER (dir.), *L'étranger face au droit. XX^e journées d'études juridiques J. Dabin*, Bruxelles, Bruylant, 2010, p. 193-210.

⁵ D. B. OPPENHEIMER, S. R. FOSTER & S.Y. HAN, *Comparative Equality and Anti-Discrimination Law. Cases, Codes, Constitutions and Commentary*, New-York, Thomson Reuters/Foundation Press, 2012.

⁶ *Global Challenges and New Perspectives on Equality Law*, 3rd annual international conference of the Berkeley Comparative Anti-discrimination Law Virtual Study Group, organised in Brussels by the Perelman Centre for Legal Philosophy and the Institute for European Studies (ULB), in partnership with the UC, Berkeley and the Open Society Justice Initiative, on 5-6 May 2014. The program is available on the websites of the Perelman Centre and the IEE.

⁷ “The *Fiat* case: Reframing an Industrial Dispute in Anti-discrimination Language”, *E.J.H.R.*, 2015/1, p. 36.

at stake.⁸ By showing how the ECJ and national courts in Europe filter non-discrimination claims through adopting a narrow understanding of disability, Lisa Waddington uncovers a transnational process that produces a restrictive approach to discrimination claims.

Ioanna Tourkochoriti looks at the concept of disparate impact as a legal transplant from US law to EU law where it took the form of indirect discrimination.⁹ She discusses the role of the legal context in moulding indirect discrimination as a key – yet largely unexploited – tool for combatting systemic discrimination.

As an introduction to these papers and this special issue, the remainder of this article will discuss the extent to which the traditional segregated approach, which studies different courts and legal orders in isolation from one another, no longer provides adequate conceptual and normative tools to fully grasp the evolutions of anti-discrimination law and the challenges that arise in this domain.¹⁰ We first elaborate on the transnational/global¹¹ dimension of anti-discrimination law before further discussing the role of comparative law in this process.

I. A global approach to anti-discrimination law

The transformation of law in a globalised world is a vibrant topic in legal theory.¹² Although different readings of the phenomenon exist,¹³ most scholars still largely agree on several profound shifts, including the breaking down, or at least the gradual blurring, of major conceptual dichotomies such as international/domestic, public/private, state/non state, and hard/soft law. All of these are certainly reflective of the direction in which anti-discrimination law is currently developing.

Koh defines transnational law as a hybrid between domestic and international law.¹⁴ Using imagery from information technology, he distinguishes three ways in

⁸ “‘Not Disabled enough’: How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability?”, *E.J.H.R.*, 2015/1, p. 11.

⁹ “‘Disparate Impact’ and ‘Indirect Discrimination’: Assessing Responses to Systemic Discrimination in the U.S. and the E.U.”, *E.J.H.R.*, 2015/2 (forthcoming).

¹⁰ In this line, see our column in this *Journal* (E. BRIBOSIA & I. RORIVE, “Equality and Non-Discrimination Law – Column”, *E.J.H.R.*, 2013/2, p. 297-329; *E.J.H.R.*, 2014/2, p. 205-237).

¹¹ Irrespective of the academic debates on the differences between transnational law and global law, we refer to both concepts as equivalent in this paper.

¹² See, among many, P.S. BERMAN, “Global Legal Pluralism”, *Southern California Law Review*, vol. 80, 2007, p. 1154-1238; R. COTTERELL, “What is Transnational Law?”, *Law & Social Inquiry*, vol. 37, no. 2, 2012, p. 500-524; B. FRYDMAN, “Comment penser le droit global?”, in J.-Y. CHÉROT & B. FRYDMAN (dir.), *La science du droit dans la globalisation*, Bruxelles, Bruylant, 2012, p. 17-48; B. FRYDMAN, *Petit manuel pratique de droit global*, Bruxelles, Académie royale de Belgique, 2014; A.-M. SLAUGHTER, *A New World Order*, Princeton, Princeton University Press, 2004; G. TEUBNER, “Breaking Frames: The Global Interplay of Legal and Social Systems”, *American Journal of Comparative Law*, vol. 45, 1997, p. 145-169; W. TWINNING, *Globalisation and Legal Theory*, Cambridge, CUP, 2000; P. ZUMBANSEN, “Transnational law, Evolving”, *Comparative Research in Law & Political Economy. Osgoode Research Paper Series* (no. 27/2011), 2011.

¹³ B. FRYDMAN & G. LEWKOWICZ (dir.), *Les théories du droit global*, Paris, Presses de Sciences Po, to be published in 2015; E. BREMS & E. DESMET, “Introduction: Theorizing the Multi-layered Nature of Human Rights Law”, *E.J.H.R.*, 2014/3, p. 289-292; M. BAUMGÄRTEL, D. STAES & F.J. MENA PARRAS, “Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration”, *E.J.H.R.*, 2014/3, p. 326-354; E. BREMS, “Should Pluri-form Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *E.J.H.R.*, 2014/4, p. 447-470.

¹⁴ H. H. KOH, “Why Transnational Law Matters?”, *Penn. St. Int’l L. Rev.*, vol. 24, 2006, p. 745.

which transnational law might emerge: (1) “law that is ‘downloaded’ from international to domestic law”, (2) “law that is ‘uploaded, then downloaded’”, and (3) law that is borrowed or ‘horizontally transplanted’ from one national system to another. Applied to the European context, Koh’s comparison is very insightful as a description of the development of anti-discrimination law¹⁵ where there is plenty of evidence regarding all three processes.

‘Downloading law’ from the European to the domestic arena refers to the internalisation of an European concept into national law, many examples of which exist in EU anti-discrimination law. The instruction to discriminate, a form of discrimination prohibited in the EU directives,¹⁶ is by now part of the legal orders of all 28 Member States. The notion of discrimination by association provides another instance. Not enshrined in the text of the EU directives as such, it was constructed by the ECJ¹⁷ and then incorporated by most Member States under the supervision of the EU Commission.¹⁸

‘Uploading and then downloading law’ describes a double movement between a national legal system and the European one. A domestic rule is adopted at the European level before being implemented at national level. This is the case of several concepts enshrined in the EU equality directives of 2000,¹⁹ which were largely based on UK anti-discrimination law, and partly also on Dutch law. The intense lobbying of the Starting Line Group (founded in the late 1980s and gathering more than 400 NGOs in 1999), which was “said to be dominated by Anglo-Dutch intellectual influence”, is one factor explaining this circumstance.²⁰ In turn, the EU equality directives were transposed in all Member States. But the process did not stop here as the directives have also had a major impact on the case law of the European Court of Human Rights. Similarly, the concept of indirect discrimination (or disparate impact) travelled from the US to the UK before becoming EU law. It was then transposed in 28 Member States before finally appearing in the European Court of Human Rights’s case law after the 2007 landmark ruling in *D.H.*²¹

¹⁵ See also B. FRYDMAN & L. HENNEBEL, “Le contentieux transnational des droits de l’homme: une analyse stratégique”, *Rev. trim. dr. h.*, 2009, p. 73-136.

¹⁶ See i.e., article 2, § 4 of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J. L 180, 19 July 2000) and article 2, § 4 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (O.J. L 303, 2 December 2000, p. 16).

¹⁷ E.C.J. (GC), *Coleman*, Judgment of 7 July 2008, case C-303/06.

¹⁸ The *European Network of Legal Experts in the Antidiscrimination Field* is monitoring the implementation of the concept of discrimination by association in the 28 Member States since the *Coleman* judgment of the E.C.J.

¹⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *op. cit.*; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *op. cit.*

²⁰ D. SCHIECK, “Implementing EU Non-Discrimination Directives. Typologies of Legal Transplanting”, *International Colloquia Europees Verzekeringsrecht – Colloques internationaux de droit européen des assurances*, 2007, p. 54; A. GEDDES & V. GUIRAUDON, “Britain, France, and EU Anti-discrimination Policy: The Emergence of an EU Policy Paradigm”, *West European Politics*, 2004, p. 334-353.

²¹ Eur. Ct. H.R. (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 (Appl. no. 57325/00); D. SCHIECK, L. WADDINGTON & M. BELL (eds), *Non-Discrimination Law*, *op. cit.*, p. 323-359; Ch. TÖBLER, *Limits and potential of the concept of indirect discrimination*, Brussels, European Commission, 2008, p. 55-69.

The horizontal ‘borrowing’ of law between national systems is also a well-known phenomenon in anti-discrimination law. For example, the concept of reasonable religious accommodation, guaranteed in US statutory law since 1972 and embraced by the Supreme Court of Canada in 1985,²² is now being debated at the EU level, before the European Court of Human Rights, but also in national courts or before equality bodies in Europe.²³

Our experience in anti-discrimination law suggests that in practice many actors are involved and that the three processes described by Koh are often intertwined. The disability field offers a significant example in this respect. US anti-discrimination law played a crucial role in the creation of a duty to reasonable accommodation in the Employment Directive.²⁴ The EU, however, took the leadership in the debates that helped shaping the UN Convention on the Rights of Persons with Disabilities (2006, entry into force in 2008). As a result, the UN Convention borrows from both the US civil-rights model and the European social welfare tradition. After the EU’s ratification of the Convention, EU law on disability and the law of Member States is currently entering a new stage in which these influences are merging.²⁵ As Quinn and Flynn point out, “the borrowings from the United States, the translation of the U.S. civil-rights model into EU law with added European social characteristics, and the projection of that model outward by the European Union onto the UN has resulted in a new instrument embodying a new synthesis that, in turn, has the potential to further develop EU law and policy. The process has come full circle”.²⁶

II. Comparative law at the heart of anti-discrimination law

As a subfield of transnational law, anti-discrimination law relies heavily on comparative law. This is well illustrated in the work of the *Berkeley Comparative Anti-Discrimination Virtual Study Group* that David Oppenheimer launched in 2010.²⁷ At a time where comparative law experiences a revival in Europe (whether in curricula of law schools, PhD theses or papers published in academic journals)

²² S.C.C., *Ontario Human Rights Commission (O’Malley) v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

²³ E. BRIBOSIA, J. RINGELHEIM & I. RORIVE, “Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?”, *Maastricht Journal of European and Comparative Law*, vol. 17, no. 2, 2010, p. 137-161; E. BRIBOSIA & I. RORIVE, *Reasonable Accommodation Beyond Disability?*, Brussels, European Commission, Directorate General for Justice, 2013.

²⁴ L. WADDINGTON, “Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion”, in A. LAWSON & C. GOODIN (eds), *Disability Rights in Europe. From Theory to Practice*, Oxford & Portland, Hart Publishing, 2005, p. 125.

²⁵ G. QUINN & E. FLYNN, “Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability”, *American Journal of Comparative Law*, vol. 60, Symposium issue no. 1, 2012, p. 23-48. See also B. DE WITTE, “New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance”, *American Journal of Comparative Law*, vol. 60, Symposium issue no. 1, 2012, p. 49-74.

²⁶ G. QUINN & E. FLYNN, “Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability”, *American Journal of Comparative Law*, vol. 60, Symposium issue no. 1, 2012, p. 27.

²⁷ In this line, see D. B. OPPENHEIMER, S. R. FOSTER & S.Y. HAN, *Comparative Equality and Anti-Discrimination Law*, *op. cit.*

while also passing through a deep identity crisis (with endless and sometimes repetitive debates on the methodological pitfalls of the discipline),²⁸ we focus on assessing the extent to which comparative law is embracing a strategic perspective in the field of anti-discrimination law.

Most comparative law textbooks tell us that comparative law is useful for several purposes: to find universal principles, to understand another legal system, to understand better one's own legal system, to facilitate legal reform and, more recently, to produce an argument which can then be proposed with some authority somewhere else, especially in court.²⁹

These aims are closely linked to the history of the discipline. The official genesis of the "science" of comparative law dates back to the Universal Exposition in Paris in 1900. During the International Congress of Comparative Law, which took place on this occasion, comparative law was assigned the mission to unify the laws of the "civilized nations" and to promote, not without some irony universal peace. According to Lambert, the aim was to "dig beneath the apparent diversity of the laws" in order to uncover a "common statutory law" (*droit commun législatif*).³⁰ Saleilles, the other leading French figure at this Congress, was somewhat less ambitious as he spoke of a "qualified ideal law", that refers to common principles deemed as 'universal' but not immutable and that must adapt to the specificities of each society.³¹

This aspiration to universalism (coming in the form of either unity, uniformity or harmonization) sought to revive a European private law tradition based on Roman law, canon law and natural law.³² It soon faced vivid nationalist opposition and gave way to a more relativist discourse after World War II, stressing the importance of legal culture and legal traditions. For some scholars, the emphasis on divergence and on the specificities of legal systems such as common law and civil law is at the core of the discipline, to the extent that David Kennedy wrote that "difference" is "the art" of comparative lawyers.³³ In the regional context of the European Union, this statement on the relativist connotation of legal culture or tradition has to be qualified in view of certain initiatives, such as the *ius commune programme*. The seminal book on *Non-Discrimination Law* by Schiek, Waddington and Bell belongs to this initiative, and works under the assumption

²⁸ In this line, see, for instance, G. FRANKENBERG, "Critical Comparisons: Re-thinking Comparative Law", *Harvard International Law Journal*, vol. 26, 1985, p. 411-55.

²⁹ See, for instance, M. REIMANN & R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law*, Oxford, OUP, 2006; E. ORÜCÜ & D. NELKEN (eds), *Comparative Law. A Handbook*, Oxford & Portland, Hart Publishing, 2007; U. MATTEI, T. RUSKOLA & A. GIDI, *Schlesinger's Comparative Law: Cases, Text, Materials*, Foundation Press, 2009, 7th ed.; M. BUSSANI & U. MATTEI (eds), *The Cambridge Companion to Comparative Law*, Cambridge, CUP, 2012; M. ADAMS & J. BOMHOFF (eds), *Practice and Theory in Comparative Law*, Cambridge, CUP, 2012; M. SIEMS, *Comparative Law*, Cambridge, CUP, 2014.

³⁰ E. LAMBERT, "Rapport sur la fonction et la méthode du droit comparé", *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900*, Société de législation comparée, Paris, LGDJ, 1905, p. 38-39.

³¹ R. SALEILLES, "Rapport sur la conception et l'objet de la science du droit comparé", *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900*, Société de législation comparée, Paris, LGDJ, 1905, p. 68 & sq.

³² M. ANCEL, "From the Unification of Law to Its Harmonization", *Tulane Law Review*, vol. 51, 1976-1977, p. 108-118.

³³ D. KENNEDY, "The Methods and Politics of Comparative Law", in P. LEGRAND & R. MUNDERAY, *Comparative Legal Studies: Traditions and Transitions*, 2003, Cambridge, CUP, p. 345-433.

that “European legal orders are converging towards a ‘common law of Europe’. This common law of Europe is anchored in both traditions of national law and the harmonising effect of EU law”.³⁴

In the era of globalization, the increasing dialectic between particularism and universalism, which has always pervaded the field of comparative law, has renewed the latter’s missions. For some leading scholars, comparative law fulfils thus a critical,³⁵ and even a subversive function, as famously claimed by Horatia Muir Watt.³⁶ In other words, comparative law opens doors.³⁷ It allows the lawyer “to break away from daily routines”³⁸ and to distil new solutions, it fosters creativity and allows free thought to develop. This revival, which also corresponds to a renewed interest in comparative constitutional law (the discipline has traditionally focused on private law), brings to the fore the strategic use of comparative law and places it therefore visibly at the centre of political struggles.

In the field of equality and non-discrimination law, examples of such strategic use of comparative law are particularly plentiful. This phenomenon is triggered by different actors, and certainly not only national authorities, the EU Commission and other international bodies, but also victims of discrimination, NGOs³⁹ defending liberal or conservative agendas, the many third party interveners or amicus curiae, judges, lawyers, scholars, networks such as the European network of legal experts in the field of non-discrimination, Equinet⁴⁰ or the EU Fundamental Rights Agency.

The strategic use of comparative law in equality cases extends far beyond the process of “legal transplants” that was described in the 1970s by Allan Watson and designed as a surgical procedure in which both the donor’s and especially the recipient’s context are irrelevant.⁴¹ It is neither limited to the migration of a constitutional idea, which actually often involves their transformation in the new environment,⁴² the cross-fertilization of jurisprudence or the judicial globalization.⁴³ Rather, it allows us to get familiar with the various arguments that are put forward in support of, or against a claim, and with the strategies of mobilization and counter-mobilization in different arenas, that is, at the national, European or

³⁴ D. SCHIEK, L. WADDINGTON & M. BELL (eds), *Non-Discrimination Law*, *op. cit.*, p. 1.

³⁵ U. MATTEI, “Comparative Law and Critical Legal Studies”, in M. REIMANN & R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law*, Oxford, OUP, 2006, p. 815-836.

³⁶ H. MUIR WATT, “La fonction subversive du droit comparé”, *R.I.D.C.*, 2000, no. 3, p. 502-527. See also G. P. FLETCHER, “Law as a Subversive Discipline”, *The American Journal of Comparative Law*, vol. 46, no. 4, 1998, p. 683-700.

³⁷ J. VANDERLINDEN, *Comparer les droits*, Diegem, Kluwer, E. Story-scientia, 1995, p. 423.

³⁸ “Critical Comparisons: Re-thinking Comparative Law”, *op. cit.*, vol. 26, 1985, p. 411.

³⁹ M. TUSHNET, “The Inevitable Globalisation of Constitutional Law”, *Virginia Journal of International Law*, vol. 50, no. 1, 2009, p. 989.

⁴⁰ Equinet is the European Network of Equality Bodies which brings together organizations which are empowered to counteract discrimination (see Equinet’s website).

⁴¹ A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974.

⁴² S. CHOUDHRY, “Migration as a New Metaphor in Comparative Constitutional Law”, in S. CHOUDHRY (ed.), *The Migration of Constitutional Ideas*, Cambridge, CUP, 2006.

⁴³ A.-M. SLAUGHTER, “Judicial Globalization”, *Virginia Journal of International Law*, vol. 40, 2000, p. 1103-1124.

the international level. The comparative approach produces here the distance that is necessary for reflective and critical thinking.

Moreover, this approach helps to uncover new areas of production and implementation of the law which are neither national nor international. The “reference space” of the scholar, the practitioner, the lobbyist or the judge expands.⁴⁴ The cosmopolitan outlook provides access to a toolbox enriched with the experiences of other jurisdictions. Resources are consequently multiplied and criticism based on arguments of parliamentary sovereignty, democratic accountability or cherry picking become increasingly less convincing and unable to counter developments that are linked to the globalization of law.⁴⁵

This is what we call a global approach to anti-discrimination law. Comparative law or references to foreign law promote the diffusion of legal arguments which repetitively transform the principle of equality. In such a context, a global standard of non-discrimination might develop in a legal process that is not confined to formal borders. But global standards of equality law are not necessarily of a normative nature in the sense that a universal positive law of anti-discrimination is coming into existence. Rather, these standards mostly involve the transnational process in which anti-discrimination issues are embedded. The issue of same sex marriage is very significant in this respect. Fifteen years ago, same sex partners could not marry anywhere in the world. Since then, numerous parliaments and courts have called into question the traditional rule according to which marriage must involve a man and a woman. Equality law arguments have been at the core of that debate. Taking place at the transnational level, it creates mutual emulations and a global movement, which in turn may force constitutional or *supra*-national courts to change their position, at least in democratic States.⁴⁶ A strategic use of comparative law is effectively at play.

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⁴⁴ P. ZUMBANSEN, “Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism”, *Oxford Handbook of Comparative Constitutional Law*, Oxford, OUP, 2012, p. 81.

⁴⁵ B. FRYDMAN, “Le dialogue des juges et la perspective idéale d’une justice universelle”, *Le dialogue des juges*, Les Cahiers de l’Institut d’études sur la Justice, vol. 9, Bruxelles, Bruylant, 2007, p. 147-166.

⁴⁶ E. BRIBOSIA, I. RORIVE & L. VANDEN EYNDE, “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience”, *Berkeley J. Int’l Law*, vol. 32, no. 1, 2014.