

CHAPTER 44

COMPARATIVE LAW AND HUMAN RIGHTS

SAMANTHA BESSON

Fribourg

I. Introduction	1223
II. The Boundaries of Comparative Human Rights Law	1224
1. Notion	1225
2. Origins	1227
3. Distinctions	1228
III. The Methods of Comparative Human Rights Law	1231
1. Comparative Human Rights Law and the Transnational Consensus Method	1231
2. Comparative Human Rights Law and the General Methods of Comparative Law	1232
IV. The Legitimate Authority of Comparative Human Rights Law	1234
1. The Authority of Comparative Human Rights Law	1234
2. The Justifications for the Authority of Comparative Human Rights Law	1235
(a) The Justified Authority of Transnational Human Rights Law	1236
(b) The Justified Authority of Human Rights Comparison	1238
3. The Democratic Objection to the Legitimacy of Comparative Human Rights Law	1241
V. Selected Issues in Comparative Human Rights Law	1243
1. Methods: Quantitative Studies in Comparative Human Rights Law	1243
2. Scope: Regions in Comparative Human Rights Law	1245
3. Actors: Universal Human Rights Bodies and Comparative Human Rights Law	1246
VI. Conclusion	1248

I. INTRODUCTION

COMPARATIVE human rights law (CHRL) is another name for the comparison of human rights law or, more simply, human rights comparison.

Like comparative constitutional law, another field of comparative law with which it overlaps to the extent that constitutional law often includes human rights guarantees, it is blooming. It has established itself, since the mid-1990s, as an important dimension of the study of domestic and international human rights law,¹ but also, and not unlike comparative constitutional law in this respect, as part of the practice of domestic and international human rights institutions.² Some even consider it a distinct field of legal scholarship,³ and, respectively, an independent set of legal principles in practice.⁴

As often, however, with success comes contestation. Today, controversies abound regarding the boundaries, the authority, and the methods of CHRL. Debates about the delineations and scope of CHRL began already in the late 1990s.⁵ The 2000s saw the rise of normative discussions about the authority of CHRL and its potential justifications.⁶ Finally, as a sign of coming of age, human rights comparatists started to discuss methodological questions after 2010.⁷

In reaction to these waves of controversy, the first three sections (after the Introduction) of the present chapter are devoted, respectively, to the clarification of the boundaries

¹ See, e.g., Kai Möller, *The Gobal Model of Constitutional Rights* (2012); Todd Landman, *Protecting Human Rights: A Comparative Study* (2005); Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999).

² See, e.g., Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (2014); Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedent by Constitutional Judges* (2013); Michal Bobek, *Comparative Reasoning in European Supreme Courts* (2013); Jeremy Waldron, 'Partly Laws Common to All Mankind': Foreign Law in American Courts (2012).

³ See, e.g., Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014); Stephen Gardbaum, 'How Do and Should We Compare Constitutional Law?', in Samantha Besson, Lukas Heckendorf Urscheler, and Samuel Jubé (eds), *Comparing Comparative Law* (2017), 109 ff.

⁴ See, e.g., Jeremy Waldron, 'Human Rights: Universalism or the Integrity of a Common Enterprise?', 1 March 2017, NYU School of Law, Public Law Research Paper No 16–48. Available at <<https://ssrn.com/abstract=2848611>>.

⁵ See, e.g., Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', (2000) 204 *Oxford Journal of Legal Studies* 4, 499 ff.

⁶ See, e.g., Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium', (2005) 119 *Harvard LR* 1, 129 ff; Jeremy Waldron, 'Rights and the Citation of Foreign Law', in Tom Campbell, K. D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (2011), 410 ff; Christopher McCrudden, 'Comparative International Law and Human Rights: A Value-Added Approach', in Anthea Roberts et al (eds), *Comparative International Law* (2018), 439–458.

⁷ See, e.g., David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism', (2011) 99:5 *California LR* 1163 ff; Mila Versteeg, 'Law versus Norms: The Impact of Human Rights Treaties on Constitutional Rights', (2015) 17:1 *Journal of Institutional and Theoretical Economics* 87 ff; Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW', (2015) 17:3 *American Journal of International Law* 534 ff; Gardbaum (n. 3); Christopher McCrudden, 'CEDAW in National Courts. A Case Study in Operationalizing Comparative International Law Analysis in a Human Rights Context', in Anthea Roberts et al (eds), *Comparative International Law* (2018), 459–500.

(Section II), the methods (Section III), and the legitimate authority of CHRL (Section IV). The final section of the chapter addresses three currently debated issues pertaining to its methods, scope, and actors (Section V).

Of course, one may be tempted to approach CHRL as a sub-field either of comparative constitutional law in which comparatists compare domestic constitutional rights, or of comparative international law⁸ in which comparatists look at the domestic practice of international human rights law. Although CHRL may overlap with both of them, a key characteristic of CHRL, and one that is central to this chapter's argument, is its dual domestic-international dimension. Unlike other parts of constitutional and international law, human rights law draws its sources from both domestic and international law at the same time and those sources are mutually validated in human rights law-making.⁹ The gist of the chapter's argument, therefore, is that it is the domestic–international dual legality (or transnationality¹⁰) of human rights law that explains why human rights law-making should amount to a comparative project. It should be approached as a law-making enterprise in which comparative law is not only interesting, but required and constitutive, on the one hand, and that should not only amount to a piecemeal and retail practice, but to a systematic and universal one, on the other.

The universality of the human rights project requires developing a concern for the systematicity and legitimacy of CHRL, however.¹¹ On the proposed model, indeed, CHRL should amount to more than an exotic recreational activity for curious academics and a strategic tool in the hands of activist judges. As this chapter argues, this can only be done by bringing more legal theory into discussions of CHRL.

II. THE BOUNDARIES OF COMPARATIVE HUMAN RIGHTS LAW

This first section maps the terrain of CHRL and looks in particular at what comparing human rights means (Section II.1) and at how it developed historically (Section II.2). It also draws some distinctions between sub-fields of CHRL (Section II.3).

⁸ See, e.g., Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg, 'Comparative International Law: Framing the Field', (2015) 109 *American Journal of International Law* 3, 467 ff. See also the 'McCradden trilogy': McCradden, 'Why Do National Court Judges Refer to Human Rights Treaties?' (n 7); McCradden, 'CEDAW in National Courts' (n 7); McCradden (n 6).

⁹ See, e.g., Samantha Besson, 'Human Rights and Constitutional Law—Patterns of Mutual Validation and Legitimation', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (2015), 279 ff; Gerald Neuman 'Human Rights and Constitutional Rights—Harmony and Dissonance', (2003) 55:5 *Stanford LR* 1863 ff.

¹⁰ See Samantha Besson, 'Human Rights as Transnational Constitutional Law', in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2017), 234 ff.

¹¹ Waldron (n 2), 20–3. See also Roger P. Alford, 'In Search of a Theory for Constitutional Comparativism', (2005) 52 *UCLA LR* 3, 639 ff.

1. Notion

Human rights comparison may be approached both as a method of legal reasoning and as the outcome of that reasoning.

First of all, comparison amounts to a mode, process, or *method* of investigation or access to knowledge,¹² and this is also true of legal comparison and of human rights comparison in particular. According to Jeremy Waldron, comparison belongs to the 'legal episteme', to the extent that through comparison 'we [lawyers] stand to gain in terms of our acquisition and manipulation of specifically legal knowledge, knowledge of legal analysis,'¹³ and not so much (or not only, at least) knowledge of empirical facts or moral arguments.

To that extent, it is even more important than in other comparative disciplines or practices to distinguish legal comparison from other exercises of judgement one encounters in legal reasoning, and human rights reasoning in particular. Such distinctions are made difficult by the fact that comparison is so central to legal reasoning that it is often not explicit or, worse, combined with other, different, normative operations. This fuzziness surrounding legal comparison may explain the emergence of the broader and encompassing notions of 'migration' or 'circulation' of legal principles, including human rights conceptions, that may occur with or without actual comparison. The same may be said about 'judicial dialogue' or 'comity': they may, but need not, include comparison of judicial practices, and, conversely, judicial comparison may occur without dialogue or comity between judges.

Second, the *outcome* of the comparison, ie the differences but, mostly, the commonalities identified by comparison, may also count as (part of) the comparison itself. This is particularly important for legal comparison to the extent that it also goes by the name of 'comparative law', thereby placing the emphasis on its result, ie a potential set of common principles identified by comparison that amount to law.

In CHRL, the commonalities identified by comparison are also sometimes referred to, by practitioners and scholars alike, as the human rights 'common ground' or 'consensus'.¹⁴ That human rights consensus is identified through the '[i]ncreasingly frequent cross-references between various international and domestic courts interpreting provisions which are found in different [international human rights] treaties or domestic constitutions'.¹⁵ It also includes the outcome of human rights comparisons (i) made by other types of international and domestic institutions (for instance, the legislature or the executive), (ii) pertaining to international and domestic human rights' sources other than human rights treaties (for instance, customary law or general principles), and (iii) with respect to the making of human rights law as much as to its determination and implementation.¹⁶ Interestingly, some authors have also referred

¹² Christopher McCradden, 'What Does Comparing (Law) Mean and What Should it Mean?', in Samantha Besson, Lukas Heckendorf Urscheler, and Samuel Jubé (eds), *Comparing Comparative Law* (2017), 61 ff, 70.

¹³ See Waldron (n 2), 93–100.

¹⁴ See Waldron (n 2), 48–9; Gerald Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', (2008) 19 *European Journal of International Law* 1, 101 ff.

¹⁵ Olivier de Schutter, *International Human Rights Law* (2nd edn, 2014), 35 ff.

¹⁶ See Besson (n 10); Christopher McCradden, 'The Pluralism of Human Rights Adjudication', in Liora Lazarus, Christopher McCradden, and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (2014), 3 ff.

to that human rights consensus by resorting to historical legal concepts such as *jus commune*¹⁷ or *jus gentium*.¹⁸

Two clarifications are in order here: one about the *transnational* ambit of the human rights consensus and the other about the nature of that human rights *consensus*.

Firstly, the common principles identified by comparative law are shared by most or all the units of observation and, to that extent, may be considered a 'transnational' consensus. Thus they should not be equated with those of one single unit of observation, and hence with foreign law itself. Of course, comparison may lead to borrowing directly from one or the other units of comparison, but this is a distinctive normative operation that is independent from comparison and may not actually even require the latter in the first place. In fact, the use of 'foreign law'¹⁹, or 'foreign precedent' when it is judicial, does not usually go by the name of comparative law. The latter is used to refer only to the outcome of comparison and to the features common to the different units compared.²⁰ Moreover, when those common features are observed between different judicial practices, the outcome of the legal comparison, ie the transnational consensus as a whole, is mostly referred to as a 'transnational precedent'. While that transnational consensus may still be considered 'foreign' in cases where the legal order of reference in the comparison does not yet share its principles, it is not the law of one of the compared legal orders only, but of many at the same time.

Second, the common principles identified by comparison and constitutive of comparative law are identified by the comparatist, usually but not necessarily a judge, when assessing the variations in the attributes or properties of the different legal orders considered. The so-called 'consensus' is not a matter of agreement between the latter, nor of consent of some of them (not even of the comparing legal order itself), but of an individual identification of a common ground or set of principles through legal reasoning.²¹ That identification may then be confirmed by other domestic legal institutions through further 'boilerplating'²² of the common ground and/or by an international institution through 'consolidating' of that common ground into international human rights law, as we will see. Importantly, then, the identification of a human rights consensus through comparison should not be equated with the negation of the persistence and pervasiveness of reasonable disagreement about human rights.

In the remainder of this chapter, CHRL will thus be understood as both a process (the comparison *stricto sensu*) and its outcome (the transnational consensus identified by comparison) and, with respect to the latter, as a systematic comparative or transnational legal outcome and not as piecemeal and one-to-one citation to foreign law.

Drawing attention to the legal nature of CHRL *qua* outcome of legal comparison, especially when it is referred to as 'common law', is not symbolic. This has to do with the practical dimension of law and legal reasoning, and hence of legal comparison as an integral part of that practice.²³ The legality of CHRL raises the question whether comparative law, and

¹⁷ See, e.g., de Schutter (n 15), 35 ff.

¹⁸ See Waldron (n 2), 27–47.

¹⁹ See, e.g., Basil Markesinis and Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (2006); Vlad Perju, 'The Puzzling Parameters of the Foreign Law Debate', [2007] *Utah LR* 167 ff.

²⁰ See also Waldron (n 2), 48–9.

²¹ See *idem*, 108.

²² See Waldron, 'Rights and the Citation of Foreign Law' (n 6); Waldron (n 4).

²³ See also Waldron (n 2), 93–100.

the common principles or transnational consensus it may identify, actually belong to the sources of law. It has rightly been argued that they can belong, in the way customary law does.²⁴ Like custom, comparative law is non-written law, and it is identified by the observation of a general and regular practice that binds as law. Moreover, like custom, comparative law needs a legal institution, usually a judge, to identify it and hence to contribute to its validation. It should come as no surprise therefore that the method usually applied to identify customary law, both domestic and international, is legal comparison in general and judicial comparison in particular. The same may be said of general principles of law as another source of law that comes close to comparative law, and this with respect to their identification by comparison, to their intricate ties to customary law and to their validation by a judge. Comparative law need not be approached as a distinct legal order, therefore, but, like customary law or general principles, it may be considered a source of law that belongs to different legal orders at the same time, both domestic and international.²⁵

2. Origins

CHRL, as we know it today, dates back roughly to the mid-1990s, both as a legal practice and as a scholarly subject.²⁶

Its emergence coincided with two concurrent phenomena:²⁷ first, the rise of comparative constitutional law at the end of the Cold War, and, with it, the increase in constitutional borrowings including in the drafting of bills of rights; and, second, the consolidation of international human rights law with the development of international human rights adjudication, and, with it, the resort to human rights comparisons by regional human rights courts such as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights in particular.

Interestingly, earlier traces of CHRL may be found in the nineteenth century, and to that extent CHRL is not unlike comparative constitutional law within which it first developed. What differentiates those early kinds of CHRL from post-war ones, however, is, first of all, the emergence of international human rights law from the 1930s onwards, culminating in the post-war human rights treaties and their consolidation up to the 1970s. From then on, the object of CHRL was no longer only domestic but also *international* human rights law. A second distinctive feature related to the requirements of international human rights law is that the post-war CHRL practice is mostly *judicial*, both at the domestic and international level (although there are exceptions) which is largely due to the human right to an effective remedy, including to judicial review.²⁸

Of course, this historical account of the development of CHRL reflects a Western reality, and mostly an Anglophone and Euro-American one. This shows not only from the legal

²⁴ See also *idem*, 56–9, 67–75.

²⁵ See also *idem*, 56–9, 67–75.

²⁶ Of course, there had been antecedents in social sciences since the 1970s: e.g. Landman (n 2); Kathleen Pritchard, 'Comparative Human Rights: Promise and Practice', in David Louis Cingranelli (ed.), *Comparative Human Rights: Theory and Measurement* (1988), 139 ff; Richard P. Claude (ed.), *Comparative Human Rights* (1976).

²⁷ See Christopher McCrudden, 'Human Rights Histories', (2015) 35 *Oxford Journal of Legal Studies* 1, 179 ff, 200 ff.

²⁸ See McCrudden (n 27), 200 ff.

orders usually selected for human rights comparisons, but also from the questions raised, the methods applied, and the language(s) used. The practice and scholarship discussed in CHRL is indeed very much focused on human rights law in Europe (Western and then Eastern)—and especially Germany in that context—the United States (US) and a few other countries, mostly Commonwealth states such as Canada, Australia, New Zealand, India, South Africa, and, to some extent, Israel. In turn, this entails a selection of the researchers able to participate in CHRL, thereby self-reinforcing the Western bias over time.

All this explains why CHRL may be accused of parochialism.²⁹ Yet, this critique is more problematic than in comparative constitutional law because international human rights law is universal in scope. The comparison and corresponding transnational consensus could, and, arguably, should therefore tend to be universal as well. The parochial features of CHRL could then have deleterious consequences for the legitimacy of both domestic and international human rights law given its centrality in their making and interpretation.

3. Distinctions

Human rights comparison may pertain to at least three different objects or units of observation given the multiple orders, regimes, and sources of that law.

The first, and oldest kind of CHRL is *comparative domestic human rights law*.³⁰ It also comes closest to comparative constitutional law, both in history and in content, to the extent that comparative domestic human rights law relates to that part of domestic constitutional law that protects human rights. It focuses on horizontal comparisons of *domestic human rights law* without reference to (universal or regional) international human rights law.

Early discussions in comparative domestic human rights law focused mostly on substantive issues, ie on the content and restrictions of individual human rights. However, macro-level discussions have also developed, including discussions of the comparative structure of human rights (e.g. sources or jurisdiction) and, even more recently, of their comparative institutional circumstances (e.g. constitutional entrenchment and judicial remedies).

The second, and later, kind of CHRL is *comparative international human rights law*.³¹ It amounts to the horizontal comparison of *international human rights law* and covers competing universal and/or regional regimes and the interaction between their monitoring bodies and these bodies' respective interpretations of those regimes. Like comparative domestic human rights law, comparative international human rights law consists of horizontal comparisons, but unlike comparative domestic human rights law, comparative international human rights law compares only international norms, without reference to their influence in domestic law or to their corresponding domestic human rights guarantees.

Comparative international human rights law emerged with the development of international human rights law adjudication by international bodies in the 1990s. Regrettably, however,

²⁹ See also William Ewald, 'Rats in Retrospect', in Samantha Besson, Lukas Heckendorf Urscheler, and Samuel Jubé (eds), *Comparing Comparative Law* (2017), 19 ff, 29.

³⁰ See, e.g., Möller (n 1); Landman (n 1); Alston (n 1).

³¹ See, e.g., Eva Brems and Ellen Desmet (eds), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (2017); Carla Buckley, Alice Donald, and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (2016).

most publications in comparative international human rights law to date have focused, and relied, on the premise of the fragmentation into different universal and regional regimes.³² While this is an important issue, the respective authors reduce the role of comparative international human rights law to the identification of necessarily problematic discrepancies in human rights' interpretations among those regimes and to the search for their 'integration'. As I will argue, different domestic, regional, and universal interpretations of human rights' duties can not only be justified but are actually called for, depending on the circumstances and the relevant threats to the interests protected by those rights. Thus, to the extent that human rights comparison may identify a transnational consensus on the regional or universal plane, that consensus corresponds neither to a pre-existing coherent 'whole'³³ to be uncovered and reinstated nor to an emerging whole to be constituted through active harmonization and at any price.

The third kind of CHRL is *comparative international-domestic human rights law*.³⁴ It amounts to the horizontal comparison of the influence of *international human rights law in domestic law*. Unlike comparative domestic human rights law, it encompasses international human rights law, and unlike comparative international human rights law, it looks at international human rights law in domestic law.

Comparative international-domestic human rights law should have emerged with the development of international human rights law monitoring of domestic law by international bodies in the 1990s.³⁵ Yet, it is only recently, and in the wake of the emergence of comparative international law, that publications in comparative international-domestic human rights law have started to appear. Before the emergence of comparative international-domestic human rights law, most studies in international human rights law focused on the structure and the content of international human rights, with the rare inclusion of some compliance aspects, and then only as a top-down and non-comparative issue and from a purely international point of view.³⁶ Interestingly, while comparative international-domestic human rights law studies have become more common lately on a regional plane, either with regard to a specific regional human rights instrument³⁷ or between them,³⁸ they are still much rarer with respect to universal human rights instruments.³⁹

³² See, e.g., Eva Brems, 'Should Pluriform Human Rights Become One?—Exploring the Benefits of Human Rights Integration/Intégrer le droit des droits de l'homme: une exploration', [2014] *Journal européen des droits de l'homme/European Journal of Human Rights* 447 ff.

³³ See Eva Brems, 'We Need to Look at International Human Rights Law (Also) as a Whole', 15 October 2014. Available at <<https://www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/>>. See, however, Eva Brems, 'Smart Human Rights Integration', in Eva Brems and Saïla Ouad Chaib (eds), *Fragmentation and Integration in International Human Rights Law* (2018), 165–194.

³⁴ See, e.g., Venice Commission, *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts* (2014); Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008); Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002).

³⁵ See, however, Alston (n 1), v.

³⁶ See, e.g., Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997).

³⁷ See, e.g., Keller and Stone Sweet (n 34).

³⁸ See, e.g., Neuman (n 14).
³⁹ See, however, McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties?' (n 7), 549; McCrudden, 'CEDAW in National Courts' (n 7); Samantha Besson, 'The Influence of the UN Covenants in States Parties across Regions—Some Lessons for the Role of Comparative Law and Regions

Conversely, to this date, studies in comparative domestic human rights law have rarely compared the influence of international human rights law in domestic law.⁴⁰ They have done so only when international human rights law has been incorporated and turned into domestic human rights law,⁴¹ on the one hand, and only with respect to the institutional and structural features of domestic human rights law that result from international human rights law requirements (e.g. judicial review), on the other. The first reason for this neglect may be that many accounts of comparative domestic human rights law do not approach human rights comparison and its outcome as binding, or, at least, do not include in the scope of their comparison human rights norms that actually bind foreign authorities as much as domestic ones, such as international human rights law. A second explanation may be the opposition perceived between domestic human rights law *qua* constitutional rights and international human rights law *qua* human rights, and their lack of comparability as a result. While it is true that domestic human rights law may ensure a higher level of protection of the rights protected under international human rights law as well as protect additional ones, most of the rights protected under domestic human rights law correspond to those included as a set of minima by international legal human rights and are in a relationship of complementarity with them.⁴² It is actually that complementary overlap between domestic and international human rights law that is of interest to this chapter and that is, I will argue, comparative in nature.⁴³

The emergence of comparative international-domestic human rights law thus reveals that the comparison of domestic human rights law is difficult to disentangle from the comparison of the influence of international human rights law in domestic law and that, given the relationship between domestic and international human rights law in domestic law, the former somehow necessarily includes the latter. What this means is that comparative international-domestic human rights law is best approached as a part of comparative domestic human rights law. Since comparative international human rights law is a necessary part of comparative international-domestic human rights law to the extent that international human rights law always comes with its plurality of instruments and bodies, all three contemporary kinds of CHRL are intimately connected to one another.

Of course, contemporary studies in CHRL do not necessarily practice all three, or, at least, do not always realize or claim that they do, and thus do not organize their comparative research in that way. It is my claim, however, that they should do so, and that CHRL *lato sensu* is best approached as this single, albeit multidimensional, mosaic of comparative domestic human rights law, comparative international human rights law and comparative international-domestic human rights law. Not practising CHRL in this multidimensional fashion leads to an impoverished account of the practice of human rights law either

in International Human Rights Law', in Daniel Moeckli and Helen Keller (eds), *The UN Human Rights Covenants at 50* (2018), 243–76.

⁴⁰ See, e.g., Bobek (n 2), 34; Groppi and Ponthoreau (n 2), 4–5.

⁴¹ See, e.g., Law and Versteeg (n 7), 1189.

⁴² See Neuman (n 9); Besson (n 9); Besson (n 10); Samantha Besson, 'The Sources of International Human Rights Law', in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (2017), 837 ff.

⁴³ See Besson (n 9); Besson (n 10). See also Waldron (n 2), 120–3.

domestically or internationally. As I will argue, it thus fails to contribute fully to the comparative and transnational project of international human rights law-making.

III. THE METHODS OF COMPARATIVE HUMAN RIGHTS LAW

Methodological debates in comparative law are blooming. Such debates usually revolve around the discipline's aims,⁴⁴ objects, subjects, and methods. For reasons of scope, this section focuses on the methods of CHRL *stricto sensu*. It starts by explaining how the transnational consensus method works (Section III.1), before turning to how it relates to some of the general methods of comparative law (Section III.2).

1. Comparative Human Rights Law and the Transnational Consensus Method

Regrettably, the practice of CHRL is largely irregular with respect to method.⁴⁵ International human rights institutions often lack the necessary resources and time to devote themselves rigorously to comparative investigations. Domestic institutions are even less consistent in this respect.

The one notable regional exception is the comparative practice leading to the identification of the transnational or 'European consensus' observable both in the ECtHR's case-law⁴⁶ and in the practice of domestic courts and institutions relative to the ECHR.

The 'European consensus' in the ECtHR's case law corresponds to a form of subsequent State practice or interpretative custom of the ECHR developed among States parties and identified by the Court.⁴⁷ It is based on European States' general practice (the latter need not be unanimous⁴⁸), on the one hand, and their *opinio juris* (mostly attested by domestic judicial interpretations), on the other. The two constitutive elements of the consensus are verified by reference to various legal materials: some domestic (e.g. domestic legislation or judicial decisions) and some international (e.g. other international human rights treaties or norms and

⁴⁴ See McCrudden (n 5), 516–27; Waldron (n 2), 114–7, 411, 418, 420 ff.

⁴⁵ See McCrudden (n 5), 510 ff.

⁴⁶ See, e.g., Kanstantsin Dzehtsiarov and Vasily Lukashevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court', (2012) 30:3 *Netherlands Human Rights Quarterly* 272 ff; Christopher McCrudden, 'Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared', (2013) *Cambridge Yearbook of European Legal Studies* 15, 383 ff. On the Inter-American Court of Human Rights' transnational 'consensus' method, see Neuman (n 14).

⁴⁷ See Ineta Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights', in Council of Europe (ed), *The Judge and International Custom* (2013), 75 ff. For a full argument for the customary nature of some international human rights, see Besson (n 42).

⁴⁸ See Luzius Wildhaber, Arnaldur Hjartarson, and Stephen Donnelly, 'No Consensus on Consensus—The Practice of the European Court of Human Rights', (2013) *Human Rights LJ* 33, 248 ff.

their interpretations by their respective international organs); some soft and some hard; some internal to some or all the States parties to the ECHR and some external to that group.⁴⁹

The reference to international human rights law practice external to that of European States Parties or, at least, to those at stake in a given case, and hence to international human rights law that does not bind them, has been contested. Yet, the Court has confirmed the universal scope of its comparative practice.⁵⁰ What matters, it has stressed, is that the relevant evidence 'denote[s] a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies'⁵¹. That transnational human rights consensus constrains the Court's dynamic interpretation of the ECHR and guides it, for it substantiates the subsequent treaty practice of States as required by the international law of treaties (Art 31(3)(b) of the Vienna Convention on the Law of Treaties).

Of course, even the ECtHR's practice concerning the human rights consensus remains largely unpredictable. Thus, scholars have wondered about how general and regular the transnational practice should be before it can amount to consensus. There is nothing unusual here, however, if one considers the indeterminacy of the criteria used for the identification of customary international law in the practice of both domestic and international institutions. As a matter of fact, a lot of the academic criticism may also be directed against other largely indeterminate features of legal, and especially judicial, reasoning. Consider, for example, debates about the process of judicial 'interpretation' or 'precedents.' There are ways, moreover, for the ECtHR's approach to transnational consensus to be streamlined and generalized as a method in CHRL.⁵²

2. Comparative Human Rights Law and the General Methods of Comparative Law

It is interesting to assess how the method of CHRL so described relates to some of the general approaches to, and methods of, comparative law. In a nutshell, those are:⁵³ (moral and legal) universalism and the search for pre-existing commonality (i); functionalism, and the organization of transplants; (ii) factualism, and the attempt to identify common cores; (iii); and differentialism, ie the celebration of diversity (iv).

Unlike other comparative constitutional law contexts, where comparison may lead to the conclusion of either difference or similarity depending on how convergent domestic constitutional practices are, human rights comparison as a central part of the human rights' common project contributes to the identification of common transnational ground in the

⁴⁹ See ECtHR, *Demir and Baykara v Turkey*, App no 34503/97, 12 November 2008, paras 85–6; ECtHR, *Case of the National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, App no 31045/10, 8 April 2014, paras 76, 98.

⁵⁰ See ECtHR, *Case of the National Union of Rail, Maritime and Transport Workers* (n 49), paras 76, 98.

⁵¹ See ECtHR, *Demir and Baykara* (n 49), para 85: 'can and must'.

⁵² See, e.g., Besson (n 10); Besson (n 39); Waldron (n 2), 173–4, 187 ff.

⁵³ See, e.g., Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana LJ* 3, 819 ff, 825.

domestic and international human rights practice. Indeed, it starts from the premise that there could and should be some commonality between domestic and international human rights' interpretations and, when there is, it seeks to identify that human rights' consensus across the various interpretations compared. The minimal common ground so identified may, provided it is validated by international human rights law and institutions, become entrenched as a minimal international human rights standard that can bind domestic authorities in return and be submitted to their further interpretation and practice.

Importantly, however, that human rights' common ground does not pre-exist comparison, and it does not amount to a minimum (moral or natural law) content⁵⁴ or common denominator awaiting to be discovered or recognized.⁵⁵ Provided it is identified by comparison, it should first be constructed and consolidated and then stand to be re-consolidated again, or not, through the next comparisons and distinctions in domestic and international human rights practice.

To that extent, CHRL should not be associated with the universalist project in comparative law (i). When comparative law theories, resting on a form of moral universalism, claim that comparative law, and CHRL in particular, help identifying the (moral) 'common core' of human rights,⁵⁶ they simply miss the point of CHRL.⁵⁷

At the same time, however, human rights' reasoning is not a matter of harmonization based on that consensus once it has been identified, or even of irresistible uniformization either, but of engaging in a common project of comparison and distinction.⁵⁸ Human rights, while being universal in one way, also need to be specified in each political and legal context in order to become most effective. They are thus universal and particular at the same time. Their universal guarantees in international human rights law have to be open to different domestic and regional interpretations. Human rights comparison should therefore be approached as a dynamic process, and not as a static outcome,⁵⁹ ie as a constant negotiation between the universal and the particular.

Thus, CHRL should not be associated with the functionalist organization of legal transplants from one domestic legal order to the other (ii), or with the factualist search for common cores (iii). 'Legal transplant' theories, including their IKEA variations,⁶⁰ miss the point of CHRL. Human rights have to be home-grown to be effective in the protection against specific threats and for the specification of the corresponding duties. If there is a transplant from CHRL, it is only the transplant of a human rights minimum consolidated from the

⁵⁴ See, e.g., Alford (n 11), 659. *Contra*: Perju (n 19), 180; Waldron (n 2), 40–3.

⁵⁵ Importantly, for many authors writing in the seventeenth century already, *jus gentium* was not to be identified by 'finding' some pre-existing rational or moral commonality, but by observing legal commonalities developed by accretion. See e.g. on the notion of 'common sense' (*senso commune*) underpinning *jus gentium*: Giambattista Vico, *The New Science* (3rd edn, 1744, English translation by Dave Marsh, 2000), paras 46 and 311; Alain Pons, *Vie et mort des Nations: Lecture de la Science nouvelle de Giambattista Vico* (2015), 78–9, 82 and 131 ff.

⁵⁶ See, e.g. Alison Dundes Renteln, 'Relativism and the Search for Human Rights', (1988) 90 *American Anthropologist* 1, 56 ff.

⁵⁷ To that extent, Günter Frankenberger, *Comparative Law as Critique* (2016), Ch 6's critique of CHRL is misguided.

⁵⁸ See also Waldron (n 4); Waldron (n 2); McCrudden (n 5).

⁵⁹ See Waldron (n 2), 214–21.
⁶⁰ See Ralf Michaels, '"One Size Can Fit All"—Some Heretical Thoughts on Mass Production of Legal Transplants', in Günter Frankenberger (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (2013), 56 ff.

transnational human rights consensus and turned into abstract standards of international human rights law and hence of an international minimum that is to be specified anew domestically.

All the same, human rights law is a common enterprise we share universally, and this common enterprise has given rise to international human rights law. As a result, we may also assume that there can and should be commonalities to be identified and to consolidate along the way.⁶¹ To that extent, CHRL should not be conflated with a purely differentialist celebration of domestic legal cultures (iv).

IV. THE LEGITIMATE AUTHORITY OF COMPARATIVE HUMAN RIGHTS LAW

Difficult normative questions arise concerning the existence and nature of CHRL's authority or claim to bind actors *qua* source of law (Section IV.1); the justifications thereof, ie the legitimacy of CHRL (Section IV.2); and how to respond to the objection of its lack of democratic legitimacy (Section IV.3).

1. The Authority of Comparative Human Rights Law

Obviously, the mere fact that a given human rights practice is common somewhere does not make it a binding norm. It is not because most countries *do* practice human rights law in a certain way that others *should* do so as well. Thus an account of the authority of CHRL needs to explain how one can get from the *is* of the identification of a transnational human rights consensus to the *ought* of the duty to abide by it. This requires clarifying the inherent normativity or bindingness of CHRL *qua* source of law, ie its ability to give us objective reasons for compliance. The legal authority of CHRL as practical authority should be distinguished from its theoretical authority, ie its ability to give us reasons to believe –although the latter may exist independently. Another important delineation contrasts the objective reasons for action at stake in CHRL's legal authority with the competing prudential reasons to abide by the outcome of CHRL (e.g. comity, reciprocity).

As I explained before, comparative law is usually approached not only as a legal method, but also as a source of law.⁶² Of course, this does not mean that it should be understood as a distinct legal order. On the contrary, like customary law or general principles, and maybe even *qua* either or all of them, CHRL may be considered a source of law that belongs to different legal orders at the same time, both domestic and international.

Establishing the legal authority of CHRL as a source of law requires explaining how it can have legal authority without amounting to an ordinary set of legal rules. For this to succeed, one should provide an argument for alternative types of legal authority beyond

⁶¹ See also Waldron (n 4); Jeremy Waldron, 'How to Argue for a Universal Claim', (1999) 30 *Columbia Human Rights LR* 2, 305 ff.

⁶² See Waldron (n 2), 56–9, 67–75.

the exclusionary or peremptory way in which the authority of law is usually thought to be exercised. Indeed, the authority of law is traditionally defined as giving rise to duties to abide by law to the exclusion of any other reason that may pull in the opposite direction.⁶³

Following Waldron,⁶⁴ we need to consider other forms of legal authority than the usual peremptory kind. The main example thereof is the authority of judicial precedent that binds and has a normative impact on judicial reasoning to the extent that precedents have to be respected, but do not necessarily exclude or supersede other reasons since precedents may be overruled or distinguished. Precedents do not bind as legal rules, therefore, even though they constrain legal reasoning and give rise to legal duties. On that basis, one could approach CHRL, and the transnational consensus it may help identifying, as a binding transnational precedent.⁶⁵ Importantly, this does not preclude the authority of transnational precedents of a non-judicial kind.

This kind of alternative and non-peremptory legal authority is sometimes referred to as 'persuasive', as in the 'persuasive authority' of foreign law or foreign precedents. The problem with this qualification is that it has been used with very different normative implications and can mean almost anything today. Sometimes, persuasive authority is opposed to *binding* authority. Others use persuasiveness to refer to the *force of the reasoning* of the legal decision (giving rise to content-dependent reasons) as opposed to its bindingness by the mere fact of being law (giving rise to content-independent reasons).⁶⁶ A third group of authors use the adjective 'persuasive' to refer to binding and content-independent authority, but *non-peremptory* authority. This is the way it is used by Waldron in particular.⁶⁷ It corresponds to the alternative and more moderate kind of legal authority proposed for CHRL in this chapter, although the term 'persuasive' will not be used.

2. The Justifications for the Authority of Comparative Human Rights Law

The justification for the authority of CHRL, ie its legitimacy, amounts to *moral* reasons to abide by it because it is *law*.

First, *qua* legal authority, it should be distinguished from the independent *moral authority* of the content of the transnational human rights consensus that depends on its moral truth or correctness, and not on the existence of a transnational consensus in the legal practice of human rights. This is an important distinction to make in order to avoid another related confusion between the moral justification of human rights *qua* moral rights (e.g. their potential grounding in a plurality of interests or in dignity) and the legitimacy of human rights law, ie the moral justification of the legal authority of CHRL.

Second, the legitimate authority of CHRL needs to be established morally. This goes beyond the observation of the existence of *legal reasons* that human rights law itself may give resort to CHRL. Of course, there are legal duties (though they are rare) to resort to

⁶³ See Joseph Raz, *Practical Reasons and Norms* (1999), 44 ff.

⁶⁴ See Waldron (n 2), 61–2, 193, 221–3.

⁶⁵ See also McCrudden (n 5), 516 ff.

⁶⁶ See Markesinis and Fedtke (n 19).
⁶⁷ See Waldron (n 2), 21, 61–2, 84. See also Frederick Schauer, 'Authority and Authorities', (2008) 94:8 *Virginia LR* 1931 ff, 1940–52.

CHRL and to abide by it in domestic human rights law (e.g. Art 39(1) of the South African Constitution) or in international human rights law (e.g. Art 60 of the African Charter on Human and People's Rights). One may also mention the Preamble of the (non-binding) Universal Declaration of Human Rights (UDHR) emphasizing that 'a common understanding of these rights and freedoms is of the greatest importance' for their full realization. The mere fact that domestic human rights law and international human rights law entail such legal duties to resort to CHRL is telling, but does not, however, settle the issue of their justification.

Importantly, the ground or justifications for the legal authority of CHRL have to be objective. Its legitimacy should be distinguished therefore from subjective legitimacy based on acceptance or consent. In any case, the question of the authority of CHRL only matters if one disagrees with it. Thus, the reference to human rights 'consensus' should not be conflated with the idea of an agreement over a certain human rights conception or consent to it—not even, as I explained before, among the states or institutions that share that common ground. What matters is that there is sufficient convergence among states practising human rights law for a state not yet complying with such a converging interpretation to be bound. Thus, the proposed grounds of legitimacy of CHRL should be clearly distinguished from (state) consent and from consensualism in legitimacy theories.

There are two main justifications for the authority of CHRL and of the transnational consensus it may identify on any given human rights issue: an egalitarian and hence democratic justification, and a reflexive social-moral epistemic one (Section IV.1(b)). Those grounds for the legitimacy of CHRL as the main method of ascertainment of human rights law will appear more clearly once the duality of the domestic-international legal regime of human rights law is fully understood and its own authority is justified (Section IV.1(a)).⁶⁸

(a) *The Justified Authority of Transnational Human Rights Law*

Historically, domestic human rights law and international human rights law co-developed in such a way that the minimal common or transnational ground that gradually consolidated across States' respective domestic human rights practice was mutually reinforced and turned into an international minimal human rights standard. That international human rights standard now constrains the domestic human rights practice of states in return, but, importantly, develops further on the basis of states' transnational practice as soon as the latter is sufficiently general to have matured and consolidated into a transnational common ground.⁶⁹

As a result, the minimal content of international human rights law evolves together with that of their transnational domestic practice. This usually implies a levelling-up of the international minimal human rights standard, but one cannot exclude some degree of levelling-down in case of widespread reasonable disagreement. Of course, levelling-down is made harder by the codification of the transnational minimal human rights standard into international human rights law: since that standard requires the same level of transnational commonality of the new interpretation to evolve one way or the other, levelling-down is

⁶⁸ Note that I am not considering other competing instrumental or even inherent grounds for the legitimate authority of international human rights law in general (including non-democratic and non-epistemic ones), but am focusing only on the legitimacy of transnational human rights law and of CHRL therein. See also Besson (n 9); Besson (n 10).

⁶⁹ See Ronald Dworkin, *Justice for Hedgehogs* (2011), 337–8.

rare in practice. Some absolute limits of minimal equality and non-discrimination are also entrenched in international human rights law which must be respected even in case of levelling-down.

One may wonder about the justification of the authority of transnational human rights law in practice. *Prima facie*, indeed, international law has the kind of universal material scope that matches that of universal moral rights and hence the scope of the common project to protect human rights legally. Therefore, it would seem to provide the privileged order for the legal protection of human rights given that international human rights law claims to bind all states and since its authority, provided it could be justified, could be justified universally.

The primary justification for the transnational legality of human rights, however, lies in its *egalitarian* and hence *democratic* dimension.

As I have argued elsewhere, human rights are constitutive of our equal basic moral status.⁷⁰ Accordingly, the process through which their recognition and specification take place ought to be egalitarian and public, and include all those whose rights are affected and whose equality is at stake. What this means is that human rights should be recognized and specified as equal rights through a procedure that guarantees their public equality, that is to say a democratic procedure.

At first sight, this egalitarian and democratic argument seems to speak in favour of domestic human rights protection and against protecting human rights through international law at all.⁷¹ At the same time, of course, certain minimal egalitarian conditions have to be met for the domestic recognition and specification of human rights to be democratic. These minimal conditions of public equality should be guaranteed externally by international law and thus constrain the domestic polity. This is the point at which international human rights law, and the minimal democratic guarantees it constitutes, come into the picture. However, for these minimal democratic and human rights constraints in international law to be democratically legitimate in the first place, they should draw on the transnational common ground shared by the practice of States that regard each other as democratic. Importantly, they need not have (yet) been protected as rights to be recognized by international human rights law, but only substantially realized so as to constitute a minimal common ground among democratic States.

This is how, as I have argued elsewhere, human rights and democracy have been de-coupled and then re-coupled again since 1945 through the combination of domestic and international human rights law. This is also why it would be wrong to oppose domestic democracy to international human rights law: both human rights and democracy are protected by international human rights law complementing domestic human rights and democracy law thanks to its transnational law-making process.⁷² To that extent, the

⁷⁰ See Samantha Besson, 'The Egalitarian Dimension of Human Rights', [2012] *Archiv für Sozial- und Rechtsphilosophie* Beiheft 136, 19 ff.

⁷¹ See Samantha Besson, 'Human Rights and Democracy in a Global Context—Decoupling and Recoupling', (2011) 4 *Ethics and Global Politics* 1, 19 ff.

⁷² See Besson (n 10). Scope precludes providing a full argument here for the moral co-originality and complementarity of human rights and democracy in protecting our equal moral status, and the corresponding complementarity of individual rights and the democratic principle in international human rights law according to which neither of them may take priority over the other, but for the basic guarantees of our equal moral status in so-called core rights and duties and non-discrimination rights.

recognition and development of international human rights law truly amount to a common project among democratic states.

There is a second justification for the authority of transnational human rights law: an *epistemic* one. Given the concrete nature of human rights duties, their existence and content can only be identified in domestic circumstances. Human rights being equal rights, this is indeed the socio-comparative context in which the general threats to the interest protected by a given human right can be assessed and the potential corresponding duties identified.⁷³

Again, however, this requires that some minimal epistemic conditions be respected. These conditions are best imposed from the outside through international human rights law. However, this should be done in a way that starts from the epistemic conditions tried out previously in domestic circumstances, albeit on a larger and transnational scale, ie in the context of the original recognition of the rights that have become international human rights law and the determination of the corresponding duties. Of course, as before, once these minimal epistemic conditions are entrenched internationally, only the practice of the states embodying them shall be considered for the further interpretation and development of international human rights law, with a view to considering their new common interpretations as part of the international standard.

This approach to human rights relies on a moral epistemology that is social, and even socio-political given how human rights are constitutive of our public status as equals. Because our social context may also distort our beliefs about rights, the epistemic conditions tried out previously in domestic circumstances where human rights have developed should be those where those rights are already substantively realized. This is what Allen Buchanan has described as the 'reflexive' dimension of the moral epistemology of human rights.⁷⁴

(b) *The Justified Authority of Human Rights Comparison*

The transnationality of human rights law so identified and justified has direct implications for how we should understand its sources, both domestic and international, that is to say the way human rights law is made and specified in practice.

As a matter of fact, one methodological feature common to most sources of domestic and international human rights law, and the way in which they are interpreted, is that they all use some form of transnational human rights comparison. This may lead, in some cases, to the finding that there is a transnational human rights consensus. While international human rights institutions that identify a transnational human rights consensus may validate it as international human rights law, domestic human rights institutions also contribute, through their own human rights comparisons, to consolidating and 'boilerplating' that consensus before it is confirmed by an international institution and entrenched in international human rights law.

If CHRL has legitimate authority in both domestic and international human rights law, it is because human rights law is justified in claiming transnational and hence universal authority for the common ground shared across various domestic practices, a common ground CHRL helps identifying and constituting.

⁷³ See, e.g., ECtHR, *S.A.S. v France*, App no 43835/11, 1 July 2014, para 129.

⁷⁴ See Allen Buchanan, 'The Reflexive Social Moral Epistemology of Human Rights', in Miranda Fricker, Peter J. Graham, David Henderson, Nikolaj Pedersen, Jeremy Wyatt (eds), *The Routledge Handbook of Social Epistemology* (2019) (forthcoming).

Echoing the justifications of the authority of transnational human rights law discussed in the previous section, the first justification for the authority of CHRL is *democratic*. CHRL provides the best way to grasp what is common in democratic states' transnational human rights practice and to entrench and protect it internationally. Human rights comparison thereby contributes to the democratic justification of the authority of international human rights law as well as to that of domestic human rights law, and may be considered as justified on those grounds.⁷⁵

Importantly, the relevant unit for this democratic comparative assessment is no longer the domestic system but a transnational deliberative and practising community of democratic states(peoples).⁷⁶ To that extent, the proposed egalitarian and democratic justification of CHRL overcomes the 'single agency' problem Waldron faces in his integrity-based argument for CHRL:⁷⁷ it need not strip the community of human rights comparators from their respective political institutions, ie their States and domestic democratic institutions.

Another justification for the authority of CHRL is *epistemic*. Based on the proposed reflexive social-moral epistemology of human rights,⁷⁸ one may consider that the comparison of other domestic and international human rights practice is the best way to determine what human rights are. Because our beliefs may be distorted by our parochial social practices, it is important that human rights reasoning be comparative and include interpretations from other domestic and international human rights law and institutions that share the same epistemic premises.

Indeed, one can argue that, contrary to what authors usually claim,⁷⁹ CHRL actually amounts to a way of preventing parochial conceptions from being too quickly entrenched into international human rights law and without transnational disagreement and contestation, and hence to protecting the claimed universality of human rights from parochialism. Starting from many distinct domestic human rights' interpretations and comparing them on a transnational scale in order to identify a common ground contributes to questioning the future international human rights standard and hence to making it less parochial. Importantly, human rights comparison is pluralist and does not suppress reasonable disagreement. On the contrary, it favours experimentation and strengthens deliberation.⁸⁰ Accordingly, it reflects and even contributes to the constant passage from the universal to the particular and back again.

Importantly, this epistemic argument for transnational human rights law does not mean that human rights should be regarded as 'self-certifying'. It is not because we regard a particular transnational practice as amounting to the realization of transnational human rights law that should be entrenched as a minimum international standard that that practice necessarily corresponds to the (however pluralistic) universal moral truth or, later on, that it captures one of its (however multi-faceted) correct moral interpretations. We may be

⁷⁵ Even Waldron (n 2), 134–5, 196–8, seems to concede as much when he limits the scope of the transnational human rights consensus to that between 'free and democratic' states.

⁷⁶ See also the UDHR Preamble: 'Whereas [...] the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people' (emphasis added).

⁷⁷ See Waldron (n 2), 130–5; Waldron (n 5).

⁷⁸ See Buchanan (n 74).

⁷⁹ See, e.g., Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', (1999) 31 *New York University Journal of International Law* 4, 843 ff.

⁸⁰ See Waldron (n 2), 214–21.

entirely wrong about them and should be ready to correct ourselves. However, it is likely that we will be able better to ascertain what human rights are after having reasoned and compared human rights on a transnational scale, than doing so alone, on either the domestic or the international plane.⁸¹

Importantly, the proposed democratic and epistemic justifications of the authority of CHRL, and of the corresponding transnational human rights consensus, should be distinguished from other justifications that have or could potentially be advanced by human rights comparatists in the same universalist vein. The key to making those distinctions lies in separating the moral from the legal meanings of the ‘universality’ of human rights.

First, the proposed account of the legitimate authority of CHRL should not be conflated with justifications that derive from the *moral universality* and universal moral justification(s) of human rights. According to such arguments, what justifies the authority of the transnational human rights consensus is that it matches the universal moral rights underpinning international human rights law and domestic human rights law and that it draws on their universal moral justification(s).

The first difficulty with this kind of justifications is, as I explained before, that, in circumstances of pervasive and persistent reasonable disagreement, the existence of a transnational consensus, whether regional or even universal, is no guarantee that we got the universal moral justification right. It suffices here to think of the transnational consensus that long prevailed about the inequality between men and women. The second difficulty is that this kind of arguments is missing the target: what justifies the authority of CHRL *qua* law cannot be the moral justification of its content for that would make its legal authority redundant. Of course, someone may object that the best moral justification of universal human rights actually amounts to some sort of overlapping consensus. Again, while this could provide a justification of moral human rights in human rights theory (even though I do not think it can), it could not justify the authority of human rights law as law. In short, the justification of the authority of CHRL is not about getting to the universal moral truth about human rights, even if the latter exists and matters independently.⁸²

Second, the proposed justifications of the authority of CHRL differ from justifications that rely on the *legal universality* of international human rights law. According to such arguments, the justification for CHRL is the greater harmonization of domestic human rights law that is allegedly required by the universality of international human rights law.

While it is correct that international human rights law claims to bind universally, it is wrong to derive a duty to harmonize or even unify human rights law on the universal plane from the universal human rights duties arising from international human rights law. As I explained before, human rights duties may only be specified in the context of a political (and democratic) community, and to that extent, international human rights law can only be minimal. Of course, one may reply that the minimalist interpretations of human rights consolidated as international human rights law should themselves be harmonized universally and that CHRL contributes to that effort. While that is right, we will not know what that minimum amounts to before we have identified a common ground through the transnational

⁸¹ On moral supervenience and resorting to socio-comparative evidence of what makes us equal (and that, on this chapter’s understanding, accounts for our human rights), see also Jeremy Waldron, *One Another’s Equals: The Basis of Human Equality* (2017), 135 ff.

⁸² See also Waldron (n 2), 117–20; McCrudden (n 5), 528.

consensus of CHRL. That common ground does not pre-exist human rights comparison, and assuming there is or should be such a common ground, may be counter-productive to human rights protection. In short, the justification for the authority of CHRL is not about completing the universal harmonization of international human rights law.

3. The Democratic Objection to the Legitimacy of Comparative Human Rights Law

Ironically, one of the most serious critiques usually put forward against the legitimacy of CHRL is democratic. It is often argued that using human rights’ interpretations stemming from foreign, albeit democratic, jurisdictions amounts to a violation of the democratic principle.⁸³

To start with, this objection should not be conflated with the related critique to judicial review that may also apply to the use of foreign precedents by domestic judges. I am assuming that the latter may be addressed on deliberative democratic grounds,⁸⁴ in order to focus only on the objection pertaining to the democratic legitimacy of CHRL *qua* law.

The difficulty raised by the democratic objection is that, to quote Waldron, ‘law does not become democratic here because it was enacted democratically elsewhere’.⁸⁵ According to him, even if ‘the modern *jus gentium* should be focused on legal consensus among democracies, that is not the same as the consensus having democratic credentials in its own right’.⁸⁶

In reply, one should start by clarifying that the argument made in the previous section was not an argument for a transnational political community, even less so for a democratic one. Just as the transnational human rights consensus, and the common law that corresponds to it, do not amount to a distinct and third legal order besides domestic human rights law and international human rights law, the community of democratic communities whose human rights’ interpretations are compared does not constitute a third political community besides domestic states(peoples) and the international community of states.⁸⁷ It amounts rather to a transnational epistemic and deliberative community of democratic states(peoples) straddling all communities. The important point, however, is that those communities practice a common standard of human rights and therefore of democracy under international human rights law.⁸⁸ It is no longer reasonable to conceive of domestic democratic standards (of which human rights are a part) in isolation and without reference to the common democratic standards consolidated as international human rights law in the context of our common democratic project. This explains in turn why the consent of each democratic State that may usually be invoked as an exception to the legitimacy of international law may not be invoked as such against the legitimacy of CHRL. Not only does the object of democratic state consent need to be deliberated to remain democratically legitimate, and this can only be done through transnational channels, but that deliberation is inherently constrained by

⁸³ See on this critique: McCrudden (n 5), 501 ff, 529 ff; Waldron, ‘Rights and the Citation of Foreign Law’ (n 6), 412 ff; Waldron (n 2), 142 ff.

⁸⁴ See, e.g., Jeremy Waldron, ‘Judges as Moral Reasoners’, (2009) 7:1 *International Journal of Constitutional Law* 2 ff; Waldron (n 2), 143–55.

⁸⁵ See Waldron (n 2), 197.

⁸⁶ See *idem*, 153.

⁸⁷ See *idem*, 126–35, 133.

⁸⁸ For a similar, albeit non-democratic argument, see *idem*, 131–5.

the corresponding minimal democratic standards of international human rights law whose interpretation is at stake in CHRL.

To that extent, the respective democratic legitimacies of domestic human rights interpretations may not be contrasted in the way one may contrast the democratic legitimacy of a domestic legal interpretation with that of an international institution or court's abiding by different principles of legitimacy. Their respective standards for what a democratic procedure and decision amount to are already mutualized and deeply interconnected through the codification of international human rights law and the constantly renewed consolidation of democratic standards in its interpretation.

Of course, it is important to remember that the legal authority of CHRL is not of the main and peremptory kind that is usually thought to apply to domestic or international legal rules. CHRL is binding, but in a way that may not be decisive.⁸⁹ The reasons it gives may therefore have to be weighed against other reasons, including democratic domestic ones, in the judge's or any other domestic authority's reasoning. At this stage, someone may object to this plurality of legal authorities. It is important to remember, however, that this is already the way constitutional adjudication works today, with peremptory rules, judicial precedents and content-dependent reasons all applying in concert.

As a rejoinder, the proponents of the democratic objection may stress that not all States are democratic, and that this jeopardizes the proposed democratic argument for the legitimacy of the transnational consensus in human rights law. It is a consequence of the proposed argument, however, that non-democratic States should not be allowed to contribute to the further transnational development of the minimal international human rights standard that also amounts to a minimal democratic standard constraining democratic states. Non-democratic states' human rights interpretations should not belong to the material compared and the consolidation of the transnational human rights consensus.⁹⁰ Of course, non-democratic States should be encouraged to become democratic and actually ought to, just as they are encouraged to protect human rights and actually ought to abide by them. Being entitled to participate in the human rights comparison project and the elaboration of the transnational consensus on those rights only once they have achieved respect for the minimal democratic standards entrenched in international human rights law should amount to an effective incentive to that effect. It is actually also a responsibility of other states under international human rights law (e.g. under international human rights' treaties' responsibilities of cooperation with other states) to make sure non-democratic States abide by their human rights duties and the minimal democratic standards entrenched in international human rights law.

True, defining what a 'democratic State' actually means may lead us into the kind of 'Charybdis and Scylla' situation Waldron has in mind with respect to his own account's requirement of 'civilization'.⁹¹ This difficulty may not be as great as expected, however. Indeed, the common human rights project has already led to the consolidation of common democratic standards in international human rights law over time, and we may, as a result, refer to those as a guide of what a 'democratic State' and democratic procedures amount to.⁹²

⁸⁹ See also Waldron (n 2), 208–9.

⁹⁰ See also Waldron (n 2), 196–8. See, e.g., ECtHR, *A. v Norway*, App no 28070/06, 9 April 2009, para 74.

⁹¹ See Waldron (n 2), 193.

⁹² See, e.g., ECtHR, *Animal Defenders International v. United Kingdom*, App. no 48876/08, 22 April 2013, paras 115–16.

V. SELECTED ISSUES IN COMPARATIVE HUMAN RIGHTS LAW

The kind of human rights comparison required by the human rights project is epistemically demanding. As a matter of fact, the breadth of information required has become a growing contemporary concern among comparative human rights lawyers.

Given the universal scope of international human rights law, CHRL, when it encompasses domestic, comparative international and international-domestic human rights law, should endeavour to include as many states and legal traditions as possible. This raises difficulties in terms of the availability, but also of the accessibility and sheer digestability, of the comparative material. The consequences of those difficulties are well-known: the more universal human rights comparison tends to be, the more selective (e.g. focusing on a given legal culture (e.g. Europe, the Commonwealth or the West) or using a single language (e.g. English)) and/or superficial they become.⁹³

There are three potential solutions: the turn to quantitative methods in CHRL (Section V.1), the development of (trans-)regional human rights comparison (Section V.2) and, finally, the generalization of CHRL in universal human rights treaty bodies (Section V.3).

1. Methods: Quantitative Studies in Comparative Human Rights Law

Recent years have seen a turn to quantitative or empirical comparative methods in comparative constitutional law, but also, by inclusion, in CHRL.⁹⁴ This development has the virtue of securing the kind of global comparative information which the universal scope of CHRL requires. Some of its proponents argue that it is actually its main comparative advantage over more traditional 'qualitative' or normative discussions in CHRL whose narrow focus on issues of authority and legitimacy cannot hope, so they say, to meet the need for 'global data'.⁹⁵

Among the critiques put forward against this empirical turn, one should first mention the reduction of law and legal reasoning, and hence of eminently normative material, to numbers.⁹⁶ It seems difficult indeed to think that one could code the normative content of human rights or the justifications of human rights' restrictions, and then reduce them to binary (yes/no) models.

A second set of critiques pertains to the well-identified traps in comparative law and into which the quantitative method may lead us. It suffices to refer here to the formalistic focus

⁹³ See Ewald (n 29), 289.

⁹⁴ See, e.g., Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', (2001) 23 *Human Rights Quarterly* 3, 483 ff; Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence and Human Rights Practice', (2013) 54 *Harvard International LJ* 1, 61 ff; Hirschl (n 3), 270.

⁹⁵ See Law and Versteeg (n 7), 1167.

⁹⁶ See, e.g., Alain Supiot, 'Comparative Law between Globalisation and Mondialisation', in Samantha Besson, Lukas Heckendorf Urscheler, and Samuel Jubé (eds), *Comparing Comparative Law* (2017), 209 ff.

on constitutional or international legal texts instead of their interpretations in practice, on the one hand, and to the difficulty of assessing whether the background conditions for the citation of foreign decisions are given when resorting to statistics, on the other.⁹⁷ The former matters especially in CHRL because human rights are often guaranteed in very similar abstract terms across both international human rights law and domestic human rights law, even though they do not necessarily give rise to the same interpretations or have the same relevance in practice.

A third critique focuses on the concepts and terms used by quantitative CHRL accounts, and in particular those that stem from the commercial lexical context, such as 'import' or 'export' of human rights norms or 'competition' between human rights regimes.⁹⁸ It is difficult to see what justifies framing norms like human rights that are anti-utilitarian norms *par excellence* into this commodifying straightjacket. If one is to take the accusation seriously that international human rights law has become the 'powerless companion' of economic neo-liberalism in the last thirty years or so,⁹⁹ it is important to make sure CHRL is not put to the same use as other methods in human rights reasoning (e.g. proportionality).¹⁰⁰ While it is correct to consider that our world has become global, this need not imply that the law, and especially human rights law, should also be turned into global commodities that may be generalized¹⁰¹ and then transplanted everywhere like market products.¹⁰²

In reaction, tenants of the empirical method in CHRL have questioned the 'factual premises' of normative accounts of CHRL.¹⁰³ They claim that without quantitative studies, more 'traditional' ones would not get the facts about human rights law right. Yet, it is difficult to understand what they mean by 'factual premises' in the human rights context. It is also unclear why mathematical economics rather than, for instance, history of public law and institutions would be the best way to elucidate them.

A second answer to those critiques of quantitative methods may be that comparison is always about counting to some extent and, accordingly, that the empirical turn merely amounts to the latest stage in the development of comparative methods in general. While this is true, one should emphasize that it does not reduce comparison, and human rights comparison in particular, to a counting exercise. It is crucial to discuss what is 'counted' and how, and then how the similarities or dissimilarities are 'accounted' for normatively. To that extent, there is much to be said in favour of Alain Supiot's and Waldron's rejection of the Condorcetian *jury theorem* approach to comparative law and of their endorsement, for Supiot, of Montesquieu's cultural approach¹⁰⁴ and, for Waldron, of Aristotle's experimental approach.¹⁰⁵

A final response to the proposed critiques of quantitative methods in CHRL may be that the latter are part of the transformation of CHRL into a science.¹⁰⁶ This concern for scientific quality has actually been a common development in other comparative disciplines since the nineteenth century.¹⁰⁷ While it is true that methodological discussions are signs of the

maturity of the discipline, this does not mean that human rights comparison is best considered as a science in itself—especially when this means cutting comparison off from politics and morality. Nor does its scientific dimension, were it granted, imply that the only way to practice human rights comparison as a science is to endorse quantitative methods from the social or economic sciences rather than qualitative methods that mark the specificity of legal reasoning, including its inherently comparative specificities. Legal reasoning is neither purely empirical to the extent that it is not about establishing facts, nor purely moral to the extent that it is not only about moral justification.¹⁰⁸ When one knows how scientific methods grew out of the Roman law comparative techniques of legal disputes and their development in the medieval judicial process, it is ironic to read that comparative legal reasoning should now be expected to find its inspiration in scientific methods. Comparative legal reasoning was always a part of the lawyers' methods, whether scientific or not, and well before the empirical turn in social sciences.

2. Scope: Regions in Comparative Human Rights Law

An alternative solution to the problem of accessibility of universal comparative material in CHRL may lie in the turn to (trans-)regional comparison in human rights law instead of, or in addition to, (trans-)national comparison.¹⁰⁹ Comparative methods can remain qualitative or normative, and focus on human rights legal reasoning, while still processing comparative material on a universal scale.

Comparing human rights practice across regions, rather than states, may indeed ease the comparative process and can be justified as an intermediary stage in universal CHRL and especially in the context of the two United Nations (UN) Covenants. Looking for (trans-)regional human rights consensus could promote, through the identification of intermediary plateaux of transnational consensus, the consolidation of a universal consensus around interpretations of the Covenants' rights.

Of course, one may wonder about the normative relevance of the regional unit of reference in international human rights law and, accordingly, of (trans-)regional comparison in CHRL. But for some exceptions,¹¹⁰ indeed, most discussions in international human rights law have focused on regionalism as yet another case of fragmentation, rather than as a resource for human rights reasoning.

True, regions are not duty-bearers under international human rights law and, when they seem to be human rights duty-bearers, it is as corresponding supranational political communities and under their own regional human rights law regime (e.g. under European Union law). At the same time, however, it is clear that regions are much more than a scholarly re-construction of geographical vicinity. Instead, they have legal relevance in international human rights law. Evidence for the role of regions in securing intermediary consolidations

⁹⁷ See Ewald (n 29), 29–30.

⁹⁸ See, e.g., Law and Versteeg (n 7).

⁹⁹ See Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism', (2014) 77 *Law and Contemporary Problems* 4, 147 ff.

¹⁰⁰ See also McCrudden (n 5), 530.

¹⁰¹ See, e.g., David S. Law, 'Generic Constitutional Law', (2005) 89:3 *Minnesota LR* 652 ff.

¹⁰² See also Supiot (n 97), 216–7.

¹⁰³ See Law and Versteeg (n 7), 1248.

¹⁰⁴ See Supiot (n 97).

¹⁰⁵ See Waldron (n 2), 85–9.

¹⁰⁶ See, e.g., Hirsch (n 3).

¹⁰⁷ McCrudden (n 13), 70.

¹⁰⁸ See also Waldron (n 2), 93–108.

¹⁰⁹ See, e.g., Besson (n 39).

¹¹⁰ See, e.g., Christof Heyns and Magnus Killander, 'Universality and the Growth of Regional Systems', in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (2013), 670 ff; Eric Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions', (2017) 8 *Global Policy* 1, 119 ff; Alexandra Huneeus and Mikael Rask Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems', (2018) 16 *International Journal of Constitutional Law* 1, 136–60.

of a universal transnational human rights consensus may be found in existing regional human rights practice.¹¹¹ The latter indeed reveals the identification, through regional human rights interpretations, of common constitutional features across states in the region that are thicker than at the universal level.¹¹²

Following Gerald Neuman, the comparative success of regional human rights systems in identifying and consolidating a transnational human rights consensus may be accounted for by reference to three features of those regimes: trust, effectiveness and expertise.¹¹³ Regional human rights bodies staffed by neighbour states' nationals are indeed more likely to be trusted in interpreting human rights than universal bodies, to be effective in their claims to authority, and in enforcing human rights. They are also likely to know better how to interpret human rights in domestic socio-political and cultural circumstances.

3. Actors: Universal Human Rights Bodies and Comparative Human Rights Law

A third way of securing the universal scope of CHRL would be to broaden the scope of the actors involved in human rights comparison. To date, while domestic authorities tend to use comparison even outside of adjudication, the scope of international actors using human rights comparison has been limited to regional courts (e.g. ECtHR¹¹⁴ or Inter-American Court of Human Rights¹¹⁵). Human rights comparison should be generalized to all international human rights treaty bodies, and especially the two UN Covenants' Committees, in order to identify a transnational human rights consensus on the universal plane as well.¹¹⁶

Arguably, this is already how state practice becomes consolidated as subsequent treaty practice into Covenants' law, thanks to the periodic reporting system and the Committees' concluding observations which are then re-imposed as such onto states thanks to the perpetuation of this transnational human rights law-making cycle over time. In that sense, the way in which the Covenants' interpretations are developed is already truly transnational. It is important, however, to make this process even more comparative, and in particular to extend the use of human rights comparison to other procedures where Covenants' law is interpreted, such as general comments and individual views. Resorting to human rights comparison would actually enable the Committees to comply more strictly with the conditions of Art 31(3)(b) Vienna Convention on the Law of Treaties when interpreting the Covenants by reference to subsequent State practice. It could indeed help substantiating that state practice –and not the Committees' own practice, as it is too often the case.

Of course, as I have just explained, human rights comparison on a state by state basis is more difficult to achieve on a universal scale. Thus, treaty bodies should primarily aim for (trans-) regional human rights comparison. The fact that domestic and regional institutions, and especially domestic and regional courts, increasingly resort to CHRL could, of course, be of great help to the Committees in this comparative endeavour. Such 'boilerplating'

¹¹¹ See Neuman (n 14), 108.

¹¹² See also Heyns and Killander (n 111), 691 ff.

¹¹³ See Neuman (n 14), 106; Heyns and Killander (n 111), 673.

¹¹⁴ See, e.g., McCrudden (n 46); Dzehtsiarou and Lukashevich (n 46).

¹¹⁵ See, e.g., Neuman (n 14).

¹¹⁶ See Besson (n 39).

should actually be encouraged on the same grounds. This comparison and search for consensus should be conducted in an inclusive and universal fashion to avoid privileging some states or regions over others and favouring a single-regional and hence parochial interpretation of the Covenants.¹¹⁷

From an institutional perspective, this may imply restructuring the Committees to create regional rapporteurs, to devolve some of their work to regional sub-committees or, at least, to hold regional meetings.¹¹⁸ In this respect, greater attention to regional human rights law in the Committees' deliberations could also compensate for the lack of proportional representation of regions in the Committees' membership and to ensure better consideration of legal diversity across regions.

Provided they can identify a trans-regional consensus on a given Covenants' interpretation through comparison, the Committees should demonstrate some deference to it and enforce it through their own interpretations of state duties. The Committees actually already do so,¹¹⁹ albeit not always by referring expressly to its comparative sources or by distinguishing between them.¹²⁰ In other cases, they should grant states parties a broad margin of appreciation. Importantly, the existence of a transnational human rights consensus would not pre-empt the Committees' power to review and interpret Covenants' rights, and hence to reason in the way they think is best. Human rights comparison is only one of the dimensions of human rights reasoning and, as I explained before, its authority is of a non-peremptory kind.

There are four potential objections to human rights treaty bodies resorting to CHRL and relying on the corresponding universal transnational human rights consensus.

The first objection is that reducing the moral truth of human rights to what cannot be but a parochial consensus is not compatible with the universality of international human rights law.¹²¹ As I explained before, while it is correct to fear that the transnational consensus about human rights could be wrong about the universal moral truth of human rights, it is the best method we have from a social-moral epistemological perspective under circumstances of widespread and persistent reasonable disagreement about human rights. Its authority is also justified, secondly, by the egalitarian and democratic underpinnings of our common and hence transnational human rights project. It would be odd therefore not to trust all states, whose members' human rights are at stake, in the interpretation of those very rights. Granting a few alleged experts' conceptions of universal moral truth priority over a majority of democratic states is imperialistic and presumptuous at best, and risks becoming even more parochial than the transnational human rights consensus itself.¹²²

The second objection to the use of CHRL by the Committees lies in the prevalence of non-democratic States among states parties, and thus in the danger of their inclusion in the

¹¹⁷ See, e.g., Gerald Neuman, 'Standing Alone or Together: The Human Rights Committee's Decision in *A P v Russian Federation*', in Eva Brems and Ellen Desmet (eds), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (2017), Ch 3.

¹¹⁸ See Heyns and Viljoen (n 95), 513.

¹¹⁹ See Neuman (n 118).

¹²⁰ See, e.g., Yuval Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee', (2017) *Journal of International Dispute Settlement*, 180–198. For a discussion, see Samantha Besson, 'Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?', (2016) 61 *American Journal of Jurisprudence* 1, 69 ff.

¹²¹ See also Heyns and Killander (n 111), 674, 695.

human rights comparison for the democratic legitimacy of the transnational consensus. As mentioned before, non-democratic States' practice should not be considered in the consolidation of the transnational consensus about human rights. This does not mean, however, that human rights comparison and the identification of a transnational consensus should be abandoned altogether. Instead, non-democratic States should be encouraged to become democratic, just as they ought to protect human rights. It would be paradoxical (or even a mark of bad faith) in any case to insist, on the one hand, on egalitarian grounds that all States including non-democratic States should be included in the determination of international human rights law and hence in the transnational human rights consensus, while, on the other, refusing at a later stage, this time on universality grounds, to take that consensus seriously because it is dominated or tainted by so-called 'pretenders' and could impose parochial and non-democratic conceptions of human rights.¹²³

A third objection to the use of CHRL by the Committees could be the non-judicial and hence non-binding nature of the Committees' interpretations and decisions. In the absence of legal authority, the need for the justification of those interpretations and decisions may not seem as important, and the democratic and epistemic justifications of CHRL therein even less. Since the Committees act as if their interpretations and decisions were binding, however, they should be more concerned about their legitimacy if they want their findings to become binding one day.

A fourth objection may be that the universal human rights consensus potentially identified by universal human rights treaty bodies could only be very thin, even when it is identified on grounds of the comparative human rights practice of democratic States. However, as I argued before, the recourse to regional human rights consensus, provided it is transregional enough, may provide a means by which to thicken the universal minimum consensus from the bottom up. As a matter of fact, contradictions between distinct regional human rights 'consensuses' are not common.¹²⁴ As explained, some regional human rights regimes, and especially the European and American ones, have adopted a comparative and hence universalizing approach to the identification of their respective regional human rights consensus. In some cases, they have relied on explicit integration clauses in their human rights treaties, but the integration of other regional human rights consensus also occurs upon their judicial bodies' own decision.¹²⁵

VI. CONCLUSION

Comparative human rights law is *en vogue*, but its boundaries, methods, and authority are still in flux. The aim of this chapter has been to bring in some clarification in all three respects, while also developing a normative theory. In short, the chapter has argued that, unlike other areas of domestic and even international law, human rights law amounts to a necessarily comparative project, ie a law-making enterprise in which comparative law is

¹²³ See, e.g., *idem*, 673–4.

¹²⁴ See Heyns and Killander (n 111), 688 ff; Huneeus and Madsen (n 111).

¹²⁵ See, e.g., ECtHR, *Demir and Baykara* (n 49), para 85. See also Neuman (n 14).

not only interesting, but required and in which it should not only amount to a piecemeal and retail practice, but to a systematic and universal one.

Over the last seventy years or so, human rights have become a common project of humanity. True, that project started as a parochial one, ie mostly as a European and Christian enterprise, and it is often accused of still being such today—just as its counterpart project in international law, ie democracy. Comparative human rights law amounts to a crucial epistemic instrument in this respect: it can secure both more inclusion by considering other democratic polities and legal orders' different but legitimate conceptions of human rights, on the one hand, and more self-reflectivity about our own human rights' conceptions by bringing ourselves to question what has become largely unquestionable in the Western culture, on the other. Human rights comparison is grounded in the universality of human rights in international human rights law, but takes into account their required local socio-political contextualization in the specification and interpretation of their corresponding duties in domestic human rights law.

Of course, human rights comparatists themselves are sometimes at risk of parochialism, and comparative methods should be devised, along the lines discussed in this chapter, so as to address concerns about their own universality. This is a critique that should be taken very seriously as it is only by being comparative that human rights can remain a truly common project. Thus we should make sure not to mistake the universality of human rights across legal orders either for pre-legal or natural universal moral cores to be revealed or for generic commodities to be standardized and then imported and exported on a global scale. It is only by following this narrow and nuanced path that comparative lawyers can play their part in the pursuit of the human rights project.

BIBLIOGRAPHY

- Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999)
- Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', (2000) 20 *Oxford Journal of Legal Studies* 4, 499 ff
- Gerald Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', (2008) 19:1 *European Journal of International Law* 101 ff.
- Marie-Claire Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (2010)
- Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (2012)
- Kai Möller, *The Global Model of Constitutional Rights* (2012)
- Samantha Besson, 'Human Rights and Constitutional Law—Patterns of Mutual Validation and Legitimation', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (2015), 279 ff.
- Jeremy Waldron, 'Human Rights: Universalism or the Integrity of a Common Enterprise?', 1 March 2017, NYU School of Law, Public Law Research Paper No. 16–48; available at <<https://ssrn.com/abstract=2848611>>
- Samantha Besson, 'Human Rights as Transnational Constitutional Law', in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2017), 234 ff
- Christopher McCrudden, 'Comparative International Law and Human Rights: A Value-Added Approach', in Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds), *Comparative International Law* (2018), 439–58
- Sandra Fredman, *Comparative Human Rights Law* (2018)