Human rights elephants in an era of globalisation : commodification, crimmigration, and human rights in confinement

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PART III

Elephants' desire paths

Reconceptualising human rights protection: Towards holistic assessments

8 From Janus to Brahma
A holistic reconceptualisation of human rights

8.1 INTRODUCTION

Part II of this book has shown that international human rights law in the books is only to a limited extent able to accommodate crimmigration and commodification as contemporary challenges of globalisation. On the one hand, international human rights law has showcased a certain resilience, although at times in a haphazard and little axiomatic fashion. On the other hand, it has largely stayed veracious to its fundamental tenets, an attitude that on many occasions clashed with its resilient efforts.

This relates to what Gammeltoft-Hansen and Vedsted-Hansen call the 'cat-and-mouse game' as a particular expression of the "dark side of globalisation".[1] As they argue in relation to commodified contexts specifically, many policies involving forms of nodal governance are characterised by an instrumental form of "creative legal thinking" on behalf of state authorities as well as by the activation of competing duty holders.[2] In doing so, states either look for loopholes to circumvent or marginalise human rights obligations, or are largely oblivious of the impact of nodal types of governance on human rights protection. This ultimately results in a cat-and-mouse game between states' policy practices and international human rights law, with international human rights law continuously adapting to policy practices and vice versa.[3] Thus,

> "states exhibit a degree of 'creative legal thinking' to act at the fringes of international human rights law. Such policies tend to work in between the normative structures established by international human rights treaties, exploiting interpretative uncertainties, overlapping legal regimes, reverting on soft law standards or establishing novel categories and concepts on the basis of domestic or other parts of international law."[4]

Consequently, the cat-and-mouse game may also be relabelled as a detrimental 'rat race' between states and international human rights law. The latter on many occasions tries, in a resilient effort, to adapt to the conduct of the former

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1 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3. See also Van Berlo, 2017b, pp. 10–11.
2 Gammeltoft-Hansen & Vedsted-Hansen, 2017, pp. 2–5.
3 Gammeltoft-Hansen, 2018, p. 391; Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3.
4 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 6. See also Gammeltoft-Hansen, 2018, p. 391.

by capturing fluctuations in state behaviour within its logic, whereas the former may respond to such adaptations by further creative thinking and an ongoing exploration of the re-established legal boundaries. Given that international human rights law cannot bend beyond its breaking point, it seems inevitable that it is bound to lose the rat race in the long run: it can never regulate *all* social interaction without abolishing the fundamental tenet of territorial state responsibility on which it is premised, yet derogating from its veracity in this regard would entail the *de jure* and eventually the *de facto* collapse of the international human rights law system as a whole due to an ensuing lack of legitimacy.

From the perspective of human rights law, crimmigration and commodification developments thus potentially foreshadow a rather bleak future for settings of confinement. Juxtaposed, both globalisation developments challenge the Janus-face of international human rights law to its core as they seemingly unsettle both the 'human' and the 'rights' aspects of the legal doctrine. As previously detailed, both crimmigration and commodification challenges *de jure* international human rights norms as codified in the books, which has been analysed in Part II of this book. Crimmigration furthermore challenges international human rights law in action by negatively affecting the *de facto* equal entitlement of humans to protection – or at least their access thereof – through *inter alia* walls of noise and walls of governance – a trend that will be further addressed in the next chapter in the context of the Australian-Nauruan case study. To complicate matters even further, commodification may, as detailed in Part I, also be a particular crimmigration strategy as it may be utilised as a wall of governance behind which governments and other stakeholders can quietly manoeuvre: in this sense, commodification does not, akin to crimmigration, only challenge *de jure* international human rights law but also has the potential of impacting negatively on *de facto* protection. In situations where commodification and crimmigration are tightly interwoven, the viability of human rights law is thus challenged on multiple fronts simultaneously.

The question is, however, whether such a bleak perspective on the future of human rights is warranted. This chapter will reflect on this question by taking a step back in order to reconsider the conceptualisation of human rights as a legal Janus-faced phenomenon altogether. It will be argued that a paradigm shift – or reconceptualisation – is needed, shifting away from any predominant focus on legal theories towards a more holistic understanding of human rights. In developing such argument, the chapter first elaborates upon two mainstream responses from predominantly legal scholars to the clash between resilience and veracity, ultimately resulting in a legal impasse, as explored in Part II. Whereas some have argued in favour of *more* human rights law instruments and human rights interpretation, others have questioned such approach and seem to hint at the *downfall* of human rights. Both responses, it will be argued here, are however ultimately unsatisfactory and an alternative approach is henceforth due.

In exploring such alternative response, this chapter first draws on socio-legal notions of 'legal pluralism', 'legal consciousness', and 'legal alienation'. Whilst these notions are important fundaments for an alternative response, it is argued that they can only be *part* of the answer. The reason for this is that human rights have *four* instead of two faces and therefore resemble more of a Brahma than a Janus head.[5] Different from the Janus-faced characterisation of international human rights law in chapter 4, Brahma indeed aptly conceptualises the holistic notion of human rights set out in this chapter. He is usually described and depicted as having four faces turned in each direction, "symbolic of his omniscience" and showing that he sees everything that is happening, as having four arms, and as holding four different ritual objects.[6] These omniscient characteristics provide a suitable basis for an analogy with the reconceptualised notion of human rights proposed here. On this basis, a modified variant of existing socio-legal frameworks of 'legal pluralism', 'legal consciousness', and 'legal alienation' is proposed. As is argued, we should turn not to *legal* pluralism, consciousness, and alienation, but to *human rights* pluralism, consciousness, and alienation, in order to properly grasp the holistic role and value of human rights. Such an approach based on 'human rights pluralism' allows for a holistic understanding of human rights and opens new pathways towards exploring protection. That is to say, the existence of four human rights dimensions does not only mean that different understandings of human rights exist, but also that different ways of achieving them exist. This is highlighted by addressing the various human rights dimensions both as bases for human rights *consciousness* (or, alternatively, for human rights *alienation*), as *tools* to achieve human rights protection, and as mechanisms for *vernacularisation*, and by outlining how the dimensions in their various roles may operate both independently and in synergy.[7] To return to the metaphor of 'human rights elephants', this chapter will dissect how the human rights elephant is able to circumvent obstacles posed by globalisation developments by following various desire paths, or *'elephant paths'* as freely translated from Dutch.[8] These pathways, often of an informal nature, provide shortcuts or alternative routes to achieve protection, although not all informal routes are typically as effective as will be highlighted in this chapter. In the chapter's final part, the methodological framework that can be used to analytically

5 As Bianchi has pointed out, references to mythological figures of different provenance might lead one to think that "such references are but the affection of erudition by not too humble an author", yet – as he also acknowledges – such myths spring "naturally to mind" when thinking about a topic like human rights: Bianchi, 2008, p. 507.

6 Hazen, 2003, p. 14; B.M. Sullivan, 1999, p. 86.

7 In this sense, it is argued that human rights protection is not merely situated in the *legal* domain, nor squarely in the *socio-legal* domain, but should be understood on the basis of ideas that have previously been developed within the context of the so-called *sociology of human rights* as briefly introduced in section 1.7.: see also Clément, 2015; Frezzo, 2015.

8 See footnote 276 of chapter 1.

traverse the novel pathways of inquiry arising from the reconceptualised understanding of human rights will be addressed.

8.2 Responses to the commodification impasse

Globalisation challenges and the lack of effective avenues to account for them provoke various arguments as to the way forward. Many scholars, predominantly those with a positivist legal inclination, have responded to the impasse in line with either of two strands of reasoning: they advocate either the refinement of human rights law in line with an advanced functional approach, or warn for the end-times of human rights. Both will now be addressed in turn.

On the one hand, some scholars continue to base their claims against perceived wrongs and injustices firmly on the doctrine of (international) human rights law, representing a nearly unconditional faith in its protection value and its hegemony as framework of humanity and justice. These scholars agree that human rights law is simply too fundamental and too important to give up on, although they frequently disagree as to the amendments needed to achieve true justice and protection for all. Their reasoning is widespread in scholarship: "[i]f the human rights regime appears to fail in its purpose, the usual response is to clarify legal rules by drafting more international law, rather than to question the efficacy of the dominant legal approach or the norms and principles that international law is said to enshrine".[9] An example would be where the failure of human rights law to provide effective protection to particular populations as examined in chapter 4 would lead to calls for further conditionalization of accepted interferences with particular human rights provisions. Similarly, as illustrated in chapters 2 and 5 in relation to the ongoing debate about private human rights obligations, various scholars maintain on a *normative* plane that such obligations are crucial and necessary, yet have not questioned the appropriateness of human rights law as an applicable framework in the first place.[10] Likewise, in the context of offshoring, various authors have taken for granted that international human rights law *should* be further developed in order to hold states responsible for extraterritorial wrongs and injustices that are not, at least not *prima facie* or evidently, covered by human rights law's scope as distilled in case-law. Pijnenburg, examining Italy's involvement in Libyan pullback operations in the Mediterranean Sea, for example concludes that "holding Italy responsible would require the Court to move beyond established precedent in its case-law", yet she *still* argues in favour of such far-reaching reinterpretation: "[a]lthough this is a move which can be difficult to make given the political tide in Europe, it would not be the first time that the Court takes its case-law, and thereby

9 T. Evans, 2005, p. 1047.
10 Clapham, 1996; Jägers, 2002, p. 256; Karavias, 2013, p. 20.

human rights protection, a step further".[11] In this sense, authors adhering to such reasoning continue to find answers to perceived wrongs and injustices by reference to international human rights law, even though they simultaneously recognise that this requires substantial legal reinterpretation and significant deviation from standing case law. Even more so, in abstaining from a critical reflection on the efficacy of international human rights law as the dominant approach, many authors do not only not only explore, but also *encourage* judicial monitoring bodies to explore, bold options on the fringes of existing legal human rights frameworks. Pijnenburg thus points out

> "the bolder the Court is in terms of treading uncharted territories, both in terms of establishing that Italy exercised jurisdiction and applying the provisions on derived responsibility in the [ILC Draft Articles], the more likely it is to find that Italy is responsible. While the facts of this case may thus prompt the ECtHR to engage with broader international law norms, it may also choose to 'play it safe' both legally and politically by staying within the boundaries of its existing case-law".[12]

In this sense, various scholars ongoingly argue for legal refinement of international human rights law, often by proposing alternatives at – or just outside of – the margins to be explored. Faced with the legal impasse, for these authors, the response is *more*, not *less*, international human rights law.

Other scholars, on the other hand, ascertain the diminishing adequacy of human rights law to deal with contemporary developments of globalisation. Human rights law, in this sense, would do more harm than good.[13] As a result, albeit on varying grounds, some authors even appear to lose faith in human rights law altogether, promulgating "the case against human rights"[14] or warning for "the end(times) of human rights".[15] From this perspective, commodification and crimmigration fit within a more generally framed critique of human rights law as either being inapt to deal with contemporary developments of globalisation and neo-liberal capitalism, or as being usurped and consequently compromised by these developments. The logical conclusion is, according to these authors, that we are facing – or soon will face – the end of human rights. As Hopgood for example argues, "[a] disconnect is opening up between global humanism with its law, courts, fund-raising, and campaigns on the one hand, and local lived realities on the other. It is a disconnect between Human Rights and human rights […]. The way in which this claim

11 Pijnenburg, 2018, p. 396.
12 Pijnenburg, 2018, p. 426. See similarly Oudejans et al., 2018, p. 25.
13 See also D. Kennedy, 2002, pp. 118–119.
14 Posner, 2014c.
15 Douzinas, 2000; Hopgood, 2013; Wacks, 1994.

to moral authority carries the day is vanishing fast".[16] From a slightly different perspective, Douzinas argues that human rights have a

> "tradition of resistance and dissent from exploitation and degradation and a concern with a political and ethical utopia, the epiphany of which will never occur but whose principle can stand in judgment of the present law. When human rights lose that element, they remain an instrument for reform and, occasionally, a sophisticated tool for analysis but they stop being the tribunal of history. […] The end of human rights comes when they lose their utopian end".[17]

For these scholars, the answer is thus not necessarily *more* international human rights law. Pointing to the disconnect between human rights as legal norms and human rights as lived experiences, or utopian ends, they warn that further refinement and expansion of the system may in fact be human rights' nemesis as it will only further highlight the legal domain's inability to effectively grasp contemporary realities of globalisation. That is, sovereign states are ultimately overseeing any refinement or expansion process and are thus able to frustrate any true utopian endeavour in favour of self-serving purposes. As Douzinas points out, the paradox at the heart of human rights law is that it operates to justify resistance or to request protection from a state whilst states are simultaneously the ultimate guarantors of human rights.[18] States can thus obstruct the refinement of international human rights law on beforehand, for example by negating refinement efforts at the drafting stage,[19] or afterwards, for example by modifying their policy practices in order to circumvent any novel requirements set by case law. This refers back to the 'dark side of globalisation' that was denoted above: since international human rights law is nearly inevitably going to lose the 'rat race' with states' policy practices, any further participation in such rat race – for example by advocating further refinement or expansion – would only emphasise how impeded human rights law actually is in the pursuit of resilience.[20] If anything, *less*, not *more,* international human rights law would henceforth be needed insofar as these authors are concerned.

Both lines of reasoning are however little satisfactory. On the one hand, calls for more expansive interpretation and a more expansive reach of human rights law are generally well-intentioned but may harm the human rights project altogether, as scholars of the second strand of reasoning point out. As Posner explains, the expansion of human rights law has led to a catalogue

16 Hopgood, 2013, pp. 14–16. Hopgood makes a distinction between Human Rights (uppercase) and human rights (lowercase), the former mainly resembling human rights as law whereas the latter primarily concerns a natural law account of human rights.
17 Douzinas, 2000, p. 380.
18 Douzinas, 2000, p. 21.
19 See e.g. Hopgood, 2013, p. 20.
20 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3.

of as many as 400 rights that includes nearly everything one may find worth protecting, offering governments opportunities to pick and choose from these rights in order to justify their policies.[21] Consequently, such expansion "runs the risk of turning the notion of human rights into little more than an empty vessel – having a significant size but carrying little substance".[22] For international human rights law, the rat race is henceforth not only untenable but may in fact also be counterproductive: the continuous adaptation and expansion of international human rights law increases opportunities for political manoeuvring, with duty bearers cherry-picking across different legal regimes and interpretations.[23] Even more so, as Koskenniemi argues, expansionism ultimately accommodates "the banal administrative recourse to rights language in order to buttress one's political priorities".[24] As Hafner-Burton and Tsutsui add on the basis of their quantitative analysis into the effectiveness of international human rights law, repressive governments become members of human rights regimes *inter alia* because "they gain certain political advantages from membership but all the while can get away with murder".[25] The ever-increasing number and ever-expanding scopes of human rights catalogues thus do not only provide justifications for states to hide behind in explaining why they do not live up to particular rights, but also provide a language of legitimation in which political decisions – even those resulting in repression – can be couched.

Furthermore, as already touched upon above, initiatives expanding the reach of human rights law need to be aware of the fact that human rights law cannot bend beyond its breaking point. To bring all harmful conduct – either in confinement or elsewhere – within its ambit is to let go of the fundamental premises of human rights law as being grounded in territorial state power, which is both legally and practically unfeasible and would require a new legal and conceptual framework altogether in order to prevent the system's illegitimacy and/or delegitimation. Without such an improbable novel framework, however, there is always a certain leeway or grey area where power can be exercised in a way that is at odds with the utopian values of human rights law whilst simultaneously not violating human rights obligations in a legal sense as such; and, consequently, it is this grey area that accommodates the deflection of *de jure* human rights responsibilities. For instance, as detailed in Part II, private conduct and extraterritorially exercised power only exceptionally trigger a state's human rights responsibility. This by extension means that a state's jurisdiction is presumed *not* to be triggered in extraterritorial situations and that a state's responsibility is presumed *not* to be engaged

21 Posner, 2014a, 2014c.
22 Van Berlo, 2015d.
23 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 6.
24 Koskenniemi, 2011, p. 134.
25 Hafner-Burton & Tsutsui, 2007, p. 414.

in relation to private conduct, *unless* the relevant criteria as previously set forth are fulfilled. By not fulfilling these criteria – either on purpose or otherwise – states consequently can deflect their legal human rights responsibilities. To prevent this from happening, the exceptional cases of extraterritorial jurisdiction and private responsibility would have to be transformed into what might be labelled the 'new normal', yet this is not feasible nor desirable per se given the difficulties related to such an expansionist approach explained above.

On the other hand, proclaiming the 'end' of human rights law is hardly desirable either, not in the least because on many occasions it is by and large the *only* legal framework of protection against non-curtailed state power. Indeed, human rights are most important for those who cannot claim entitlements on the basis of, for example, citizenship status – and, it can be added here, for those whose citizenship rights are gradually taken away on account of their progressive removal from society. For confined non-citizens and sub-citizens, as well as for others, human rights law thus provides – or at least is supposed to provide – a legal and symbolic bottom line of protection of dignity and well-being. One should thus remain cautious in relation to any claim that such a protection mechanism – even when seriously flawed – should be abolished altogether, unless there is reason to believe that no good can come from it and that the framework operates in a way that is completely and structurally anathema to what it is supposed to achieve, and, in addition, such claim should only be made insofar as a more emancipatory project is tangibly visualised.[26] In addition, talk about the 'endtimes' of human rights *law* may too easily be confused with the end of 'human rights' as such. In fact, various scholars dealing with the supposed end of 'human rights' – full stop – often base their conclusions on a human rights *law* conception. Some influential writers have indeed authored work with the telling titles "the end of human rights" (Douzinas),[27] "the end of human rights?" (Wacks),[28] "the endtimes of human rights" (Hopgood), and "the case against human rights" (Posner),[29] whereas in reality they primarily deal with human rights *law,* that is, human rights understood from a legal perspective.[30] We should thus be careful not to throw human rights out altogether simply because they, in their contemporary legal form, may be considered "parochial, timid, ultimately self-serving, and worst of all, terribly ineffective".[31] As Gibney argues, "we have never really 'done' human rights in the first place. This is of course not to say that

26 Although it should be noted that the dominance of the human rights project itself may in part have caused the lack of more emancipatory alternatives: see D. Kennedy, 2002, p. 108.
27 Douzinas, 2000.
28 Wacks, 1994.
29 Posner, 2014c.
30 Hopgood, 2013.
31 Gibney, 2016, p. 154.

we have not done anything. International human rights law is now all around us and policy makers of all political persuasions are forever invoking human rights. However, all we have had is a facsimile of human rights, but nothing approaching the real thing".[32]

8.3 In search of a socio-legal alternative: legal pluralism, legal consciousness, & legal alienation

Since both answers to the human rights impasse discussed above are not feasible nor desirable, another approach is due. It is argued here that in exploring other options, we should shift away from the doctrinal legal focus that has dominated the formulation of responses so far. Thus, whilst both of the responses outlined above ultimately fail to be compelling for different reasons, the underlying problem is that they both essentially reason from the perspective of *de jure* human rights law. Such calls specifically focus on black-letter law realities by trying to amend international human rights law in the books in order to match the empirical world, or by pointing out why black-letter law will always lag behind given that in light of the empirical world it is ineffective, usurped, or both. The opposite trend – i.e. the way in which human rights may play a part in, and be effectuated through, social interaction in everyday life – remains however largely underexplored. This topic will now be turned to in order to lay the groundwork for an alternative response to the human rights impasse.

Scholarship on legal pluralism constitutes a natural starting point in this regard. The idea of legal pluralism essentially addresses the coexistence of normative frameworks within one socio-political space.[33] Early work on legal pluralism often considers the nation state as the main socio-political space of relevance, yet over time focus has shifted more and more towards transnational spheres within which law-making capacities are present, such as the platforms on which regional or international human rights instruments are created.[34] Interest in legal pluralism has, furthermore, grown significantly, up to the point where nowadays "legal pluralism is everywhere".[35] It developed as an answer to positivist (or doctrinal) legal theory in order to challenge the idea that national or transnational authorities are the only entities that issue and enforce norms and in order to pose a framework to ascertain whether and why centrally issued norms are effective in practice.[36] In the context of international

32 Gibney, 2016, p. 154.
33 J. Griffiths, 1986; Merry, 1988, p. 870; Oomen, 2014, p. 474; Praet, 2018, p. 29; Seinecke, 2018, p. 14.
34 Oomen, 2014, p. 475. See, for example, the edited volume by Luts-Sootak, Kull, Sein, & Siimets-Gross, 2018.
35 Seinecke, 2018, p. 13.
36 Oomen, 2014, p. 474. See also S.F. Moore, 1973, pp. 720–721.

human rights law, legal pluralism may thus be used *not* to examine the internal normative coherency of international human rights law regimes – which is a question central to positivist or doctrinal legal theory – but rather to examine the empirical impact of international human rights law in specific contexts. By extension, whereas doctrinal legal theory may focus on normatively criticising legal instruments or on improving them in such a way that they most optimally reflect and accommodate the traits and particularities of the empirical world, legal pluralists may focus on explaining why human rights law, with all its (im)perfections, is, or is not, effective or relevant in the empirical world. Both are thus about implementation, yet in completely different ways: the former is concerned with implementation of the empirical world into legal frameworks – making law 'reality-proof' – whereas the latter is concerned with the implementation of legal frameworks in the empirical world – questioning law's salience in actual society.[37]

Seminal work in the latter regard includes Barbara Oomen's work on the implementation and integration of international human rights law in local contexts.[38] As she points out, legal pluralism provides an excellent paradigm to approach the effectiveness of human rights law: whilst human rights are "one of the most dominant normative fields in the current world order", they at the same time are never the *only* normative order applicable to a certain case study.[39] International human rights law thus almost always applies, yet it also almost always has to compete with other normative orders. This makes it a particularly interesting locus of study for legal pluralists. Accordingly, a plethora of case studies have focused on the impact of human rights law in settings where simultaneous normative orders apply, varying widely from witchcraft in South Africa,[40] to 'tribal women fora' in India's South Rajasthan,[41] post-conflict customary justice in Sierra Leone,[42] indigenous justice systems in Latin America,[43] and – in Oomen's work – passive voting rights of orthodox-protestant women in the Netherlands.[44] What this body of work shows is that legal human rights norms are most effectively implemented in local contexts through their integration into co-existing normative frameworks that otherwise might compete with the human rights law system. Sezgin, for

37 In this sense, the distinction between the 'law in books' and the 'law in action' should be nuanced: the fact that some scholars focus on the law in books does not mean that they have no regard for the law in action, and *vice versa*. Rather, it is the *interplay* between the law in books and the law in action that is studied differently by different scholars and within different sub-disciplines.
38 Oomen, 2009, 2010, 2014.
39 Oomen, 2014, p. 479.
40 Kallinen, 2013.
41 Tschalaer, 2010.
42 Corradi, 2010.
43 Inksater, 2010.
44 Oomen, 2014.

example, emphasises that "human rights activists, donors and members of programmatic communities […] need to design intervention mechanisms and tools to integrate universal human rights standards into customary and religious systems around the world."[45] The key to success would thus reside in *other* normative frameworks than those constituted by international human rights instruments, since such frameworks would 'translate' human rights standards into viable aspects of local norms, cultures, practices, and traditions and therewith into tangible standards for ordinary social interaction – a process that is denoted as a process of *vernacularisation*.[46] Such a process brings, as Levitt & Merry conclude, "human rights as a justice ideology into a wide range of communities".[47] Benhabib likewise points out that "even the most cosmopolitan norms, such as human rights, require local contextualization, interpretation, and vernacularization by self-governing peoples."[48] Oomen in her study of Dutch orthodox-protestant women for example finds that "aligning human rights with religious and cultural beliefs, and drawing arguments for their implementation from such beliefs, can often be much more effective than framing discussions merely in terms of rights violations".[49] In order to study the role of human rights law in actual society, an alternative response to the human rights impasse should henceforth take the process of vernacularisation into account. In doing so, it can identify concurring norm systems that may appropriate and adopt norms of international human rights law and that may, subsequently, translate them into everyday-life vernaculars, therewith creating new pathways for their effective utilisation.

Closely related to such processes of vernacularisation are the notions of *legal consciousness* and *legal alienation*, which provide useful conceptual tools to imagine the basis on which, in a legal pluralist world, the vernacularisation of central human rights law norms in local contexts takes place. The term 'legal consciousness' emerged within the field of socio-legal studies as an alternative to both traditional legal research and typical socio-legal studies into the causal and instrumental relationships between law and society.[50] Instead, the concept of legal consciousness "refers to what people do as well as say about law" and is thus "understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified".[51] In this sense, the notion of legal consciousness places law right at the heart of social interaction: it studies law not as it is on paper, nor its direct effects on society, but rather examines what role is accorded to law in

45 Sezgin, 2010, p. 7. See also Provost & Sheppard, 2013, p. 3.
46 Benhabib, 2009, p. 692; Cheng, 2011; Levitt & Merry, 2009; Merry, 1993, 2006, Oomen, 2010, p. 14, 2014, p. 483; Provost & Sheppard, 2013, p. 1.
47 Levitt & Merry, 2009, p. 458.
48 Benhabib, 2009, p. 692.
49 Oomen, 2014, p. 485.
50 Cowan, 2004, pp. 928–929; Hertogh, 2018, p. 7.
51 Silbey, 2008. See also Fritsvold, 2009, pp. 803–804.

social relations and practices. "[L]egal consciousness, as participation in the production of legal meanings, cannot be understood independent of its role in the collective construction of legality", as Silbey notes.[52]

The notion therewith neatly ties in with ideas of legal pluralism and vernacularisation. Those examining legal consciousness primarily deal with the way in which hegemonic legal interpretations are (re)produced, sustained, or amended through participation and interpretation – in this sense, legal consciousness can indeed be regarded as a crucial element of effective vernacularisation. These processes of participation and interpretation are ultimately inherently subjective as they seek to clarify the experiences and perceptions that people routinely have with law in their everyday life.[53] They also are heterogeneous as people have different perspectives on legal frameworks, discuss them in different terms, and employ different and often competing legal strategies.[54] In turn, this branch of scholarship henceforth emphasises the importance of approaching enquiries as to the role of law not simply by looking at black-letter law, nor by merely addressing the impact of law on society, but by delving into the manifold subjective experiences and social constructions of legal phenomena. The concept of legal consciousness therefore provides fertile ground to advance an alternative response to the legal impasse of human rights. It breaks free from the impasse by focussing not on the implications of globalisation for international human rights law in the books but rather by rooting its locus of knowledge in processes of vernacularisation in the social context:

> "it opens up a whole new arena of subjective experiences of law which is missed by scholarship which puts formally legal phenomena at the heart of its methodology. The insight of the legal consciousness literature is that law is experienced in everyday life outwith the terrain marked by formal legality (however generously defined). Legal consciousness research consciously de-centres law as a social phenomenon."[55]

The concept of legal consciousness henceforth allows one to examine the role of law *beyond* the impasse identified above, since such impasse ultimately relates to legal instruments and their operation rather than to lived experiences. For example, in studying the US wage equality movement of the 1970s and 1980s, McCann uses the concept of rights consciousness to explore "the diverse, often defiant forms of practical legal knowledge shared among citizens *in* society that are not reducible to official legal texts."[56] Transposed to the context of the present research, commodification and crimmigration in the

52 Silbey, 2008.
53 Cowan, 2004, p. 929; Engel, 1998.
54 McCann, 1994, p. 283.
55 Cowan, 2004, p. 929.
56 McCann, 1994, pp. 227–228.

realm of confinement may lead to a legal human rights impasse insofar as legislative and jurisprudential developments on the one hand and policy changes on the other revolve around the ongoing rat-race, or cat-and-mouse game,[57] yet this does not mean that such impasse obstructs human rights law from having an effect through processes of legal consciousness and vernacularisation. Conversely, by approaching human rights from a socio-legal rather than a positivist doctrinal perspective, the beginning of a more holistic approach towards assessing their role becomes tangible. This requires not, as the previously explored approaches have promulgated, *more* human rights law, nor *less* human rights law per se, but rather demands the inquiry itself to be shifted from the level of normative legal parameters towards the level of empirical subjective experiences and social relations.

Nevertheless, one shortcoming of the bulk of research into legal consciousness is, as Hertogh points out, that it focuses primarily on the *salience* of law in society without questioning *whether* and *how* law matters in the first place.[58] As legal pluralism teaches us, it is also very well possible that law is *not* at the core of social relations or subjective experiences but is, rather, absent from everyday life.[59] In this sense, vernacularisation of legal norms may thus also purposively *not* take place. The famous study by Sally Falk Moore into so-called 'semi-autonomous social fields' is a clear example in this regard: in legal pluralist environments, centrally issued legal norms are on various occasions less effective in regulating and constraining social interaction than local norms.[60] Members of the general public frequently consider central laws as alien, distant, and threatening and accordingly at times want such norms to only play very restricted roles in their social interaction.[61] Such attitudes show a significant lack of vernacularisation, as local normative orders in such instances do not only lack alignment, but also significantly conflict, with central norms. Hertogh calls these processes *'legal alienation'*, as opposed to legal consciousness, to denote public discontent with law and the justice system and the consequent subjective non-experience and non-perception of law as a vital part of everyday life and social relations.[62] As legal pluralism informs us, since a multitude of normative orders exist consecutively, such discontented members of the public can easily go on a "normative-order shopping spree" in minimising the impact of legal norms that constitute, at least for them, but one policy option.[63] Similar to legal consciousness, the notion of legal alienation in turn also allows us to go beyond the legal human rights impasse in

57 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3. See also Van Berlo, 2017b, pp. 10–11.
58 Hertogh, 2018, p. 12.
59 Hertogh, 2018, p. 13.
60 S.F. Moore, 197.
61 Engel & Engel, 2010, p. 76; Hertogh, 2018, p. 14.
62 Hertogh, 2018, p. 14.
63 Klabbers & Piiparinen, 2013, pp. 27–28.

order to examine the role of law in society *beyond* such impasse, or, more precisely, to examine the extent to which such role is absent. Combined, then, legal consciousness and legal alienation can be used to measure the lie of the land in relation to the role of human rights law in society: it provides a lens to examine both how human rights law does, and how it does not, play a role in everyday interactions beyond its black-letter capacity.

So far, so good: the notions of legal pluralism, legal consciousness, and legal alienation seem to provide a basis for an alternative response to the identified human rights impasse. Even where globalisation developments do not align with black-letter international human rights law, this does not *a priori* mean that human rights necessarily lose their impact and value as they may still play a role in empirical reality, which can be examined by looking at processes of vernacularisation through legal pluralism, legal consciousness, and legal alienation. However, whilst these key concepts may provide a *beginning* of an alternative answer, it will be argued in the remainder of this chapter that they provide, in the context of human rights specifically, insufficient basis for a novel approach altogether. The reason for this is to be found in the conceptual difference between *law* on the one hand and *human rights* on the other. To properly understand this, it is however necessary to first tap into literature on different 'schools' of human rights before returning to these socio-legal notions in further developing an alternative response.

8.4 From law to human rights

So far, this book has focused on human rights *law* as the hegemonic articulation of human rights. This holds not only true for the positivist doctrinal analysis in Part II of this book, but also for the first consideration of an alternative, socio-legal response to the legal impasse in this chapter. As the work of Oomen illustrates, legal pluralists working on issues of human rights may have particular *regard* for society yet often continue to view human rights as a *legal* type of normative order, that is, human rights are frequently considered to be "those fundamental rights laid down in international treaties".[64] Whilst such legal grounding is not surprising – these scholars are, indeed, *legal* pluralists – it nevertheless fails to capture the full dynamic and potential of human rights.

Law is, indeed, not all there is. Human rights are not necessarily restricted to a legal reading but may also play a role in other, extra-legal, ways.[65] As Nussbaum reports, "[t]here are many different ways of thinking about what a right is, and many different definitions of 'human rights'".[66] Consequently, lawyers cannot – and arguably should not be able to – "claim exclusive domin-

64 Oomen, 2009, p. 3.
65 See also Ife, 2009, p. 112.
66 Nussbaum, 1997, p. 273.

ance of the field", even though they obviously have an important role to play in human rights theorising and human rights work.[67] In fact, consensus on what human rights are, how they should be regarded, and to what extent they contain a potential for reform is lacking amongst both scholars and lay people.[68] In turn, in exploring the role of human rights, it is not sufficient to only look at international human rights *law*: one should also have due regard to the other viable conceptualisations of human rights and the ways in which such conceptualisations may have an impact on the situation at hand – in this book, on settings of confinement characterised by commodification and/or crimmigration developments. Even more so, as Koskenniemi argues, legal codifications of human rights have at times even unnecessarily constrained and limited the true potential of human rights:

> "[W]hile the rhetoric of human rights has historically had a positive and liberating effect on societies, once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalises values and interests that resist translation into rights-language".[69]

This refers back to the arguments of scholars warning for the end of human rights, who, all on their own terms, point to the disconnect between human rights law on the one hand and the allegedly 'true' notion of human rights – whether grounded in utopian ideals, lived realities, or other sources – on the other, with the former in various accounts being represented as a semblance or travesty of the latter.[70] It is therefore not only possible but also appropriate to shift attention from the Janus-faced nature of human rights as a legal construct towards the multi-faced – and multi-faceted – nature of human rights as a broader concept. In order to do so, four archetypal 'schools of thought' about the nature, function, and merit of human rights as identified by Dembour will now be addressed.[71]

8.4.1 Four schools of human rights

Dembour developed the thesis that human rights scholarship can roughly be divided into four separate schools or domains. Some regard human rights as natural entitlements ('natural school'), others regard them as deliberative principles ('deliberative school'), protest claims ('protest school'), and/or discursive expressions ('discourse school').[72]

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67 Ife, 2009, pp. 111–112.
68 Dembour, 2006, 2010; Stenner, 2011; L. Weber et al., 2014, p. 17.
69 Koskenniemi, 2011, p. 133.
70 Douzinas, 2000; Hopgood, 2013; Posner, 2014c; Wacks, 1994.
71 Dembour, 2006, 2010.
72 Dembour, 2006, 2010.

The natural school of human rights thinking considers human rights as a *given*, resulting from a higher source such as Nature, God, Reason or Humanity: people possess human rights simply because they are human beings.[73] Natural scholars argue that human rights are, at their core, negative in character, absolute and universal, and that they exist independent of social recognition, although they only materialise through individual enjoyment.[74] Human rights norms exist on the transcendent plane, although their codification in national and international legislation is welcomed and celebrated.[75] This perspective dominates the field of human rights thinking and has been labelled the human rights 'orthodoxy'.[76]

According to the deliberative school, human rights are values of liberal societies that are *agreed upon* through genuine deliberative processes.[77] They can only govern the polity within which they were agreed upon (in positive law) to the extent to which they were agreed upon.[78] In this sense, human rights are to be understood as legal obligations that were created through legitimate law-making processes.[79] They consequently constitute no universal values until global consensus broadens.[80] On the domestic plane, constitutional law is often referred to as the deliberative standard of human rights.[81] At the international level, international human rights law could be argued to constitute a similar standard on the basis of which at least *some* universality of human rights can be discerned from a deliberative perspective – that is to say, to the extent that countries agreed upon the human rights provisions through ratification.[82] In any event, for deliberative scholars, "there are no human rights beyond human rights law"[83] and they thus can be branded human rights 'atheists'.[84]

The primary aim of the protest school is to redress injustice: human rights are *fought for*.[85] Human rights thus provide claims and aspirations that allow the poor, underprivileged, and oppressed to contest the status quo.[86] From

73 Dembour, 2010, pp. 2–3; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.
74 Dembour, 2006, p. 254, 2010, pp. 2–7.
75 Dembour, 2010, p. 5.
76 Dembour, 2006, p. 255, 2010, p. 3.
77 Dembour, 2006, p. 254, 2010, p. 3; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.
78 Dembour, 2006, p. 254, 2010, p. 3.
79 Breakey, 2018, p. 8.
80 Dembour, 2006, p. 254, 2010, p. 3.
81 Dembour, 2010, p. 3.
82 See also Breakey, 2018, pp. 7–9. In this regard, it is interesting to note the position of customary international human rights law. Customary international law becomes part of the binding body of international human rights law on the basis of both consistent state practices and *opinion juris*, which – albeit somewhat more implicitly – also hints at a deliberative understanding of human rights. On this, see also D'Amato, 199.
83 Dembour, 2010, p. 6.
84 Dembour, 2006, p. 255.
85 Dembour, 2006, p. 254, 2010, p. 3; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.
86 Dembour, 2006, p. 254, 2010, p. 3.

the perspective of the protest school, viewing human rights as simple entitlements obscures the fact that they are grounded in continuous social struggle: human rights victories are in this sense short-lived since they "never signal the end of all injustice".[87] Protest scholars consequently regard human rights as moral at their core, yet they view human rights law and institutions with suspicion as they are the arguable result of a 'hijacked' process that generally favours the elite and that leads to bureaucratization.[88] Indeed, given the structural disadvantage of some groups of people – including 'crimmigrant others' as explored in chapter 3 – in the deliberative processes and the distribution of human rights, protest movements may be expected to continuously challenge human rights understood as deliberative principles given that these institutionalise, as it were, disparity. According to this school, true human rights meaning is to be found in the needs of any struggling underclass. The protest school is thus one of 'asceticism' and 'evangelism', operating at the forefront by preaching and fighting for the application of the allegedly genuine doctrine of human rights to situations of injustice.[89]

Finally, for scholars within the discourse school, human rights exist only because they are *talked about*: they lack reverence towards the human rights concept and point towards its shortcomings in relation to the realisation of human equality.[90] According to this strand of thinking, human rights are not given, nor are they the inevitable solution to the world's ills, although they do constitute a powerful language through which political claims can be expressed.[91] Human rights revolve, thus, around 'rights talk': they are what one *says* they are, not more and not less.[92] Human rights are therefore not to be believed in – although they can, occasionally, yield positive (yet also negative) results.[93] Many discourse scholars, who can be defined as human rights 'nihilists', accordingly argue that a more promising emancipatory project is needed to achieve justice and equality for all.[94]

Importantly, these four schools do not necessarily span the full range of human rights thinking, nor are they mutually exclusive. Additional schools may be distinguished in the future and individuals may self-identify as belonging to more than one school simultaneously.[95] As Dembour states, "I have

87 Dembour, 2010, p. 3.
88 Dembour, 2006, p. 254, 2010, pp. 3, 6.
89 Dembour, 2006, p. 255.
90 Dembour, 2006, p. 254, 2010, pp. 4–8; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.
91 Dembour, 2010, p. 4.
92 Ritter, 1996, p. 266.
93 Dembour, 2010, p. 4. Rights talk can indeed also yield negative results. See for example Glendon, 1991, who asserts in the US context how public debate turned into a battlefield between stakeholders with varying interests that are continuously couching their positions in terms of *rights* and, in turn, how this paralyses political discourse and heightens social conflict.
94 Dembour, 2006, p. 255, 2010, p. 8.
95 Dembour & Kelly, 2011, pp. 20–21.

always found it possible, so far, to classify a particular human rights scholar in one of 'my' four schools, though not always squarely".[96] Of particular importance here is that the classification into four schools of thinking clearly shows that human rights can be understood as legal (deliberative) standards, but not necessarily so: they can *also*, simultaneously, be understood as natural entitlements, protest claims, and/or discursive expressions that exist independent of legal recognition.

8.4.2 From Janus to Brahma

Any inquiry into the protection mechanism of human rights arguably needs to take all aforementioned understandings of human rights into account in order to draw a genuinely holistic conclusion. Once this is accepted, it becomes clear that one has to analytically move from studying human rights as a Janus-faced legal phenomenon towards studying human rights as a more encompassing Brahma-faced notion.

Figure 10: Depiction of Brahma.

96 Dembour, 2006, p. 232.

Being omniscient in the sense that he has four faces turned in each direction as depicted in Figure 10,[97] Brahma indeed perfectly symbolises the four dimensions of human rights. Each of his four heads looks at human rights differently and therewith *conceives* of human rights in a different way.

Furthermore, Brahma is frequently depicted as having four arms and as holding four ritual objects that may be understood as further metaphors for the relevance of each of the different dimensions of human rights.[98] He holds (i) water, which as one of the four elements may be regarded as referring to the understanding of human rights as natural entitlements; (ii) a manuscript, which can be seen as representing the deliberative school relying on codified law; (iii) a sling or catapult, which may be regarded as symbolising the protest tools of the protest school; and (iv) a spoon, which may be understood as representing the idea that human rights are mere discursive constructs that come about in accordance with how we conceive of them, or, to extend the spoon metaphor, how they have been fed to us.

In sticking with this metaphor, the remainder of this chapter will frequently refer to the combination of Brahma's four heads, four arms, and his four ritual objects in discussing the protection potential of human rights.

8.5 A HOLISTIC APPROACH TO UNDERSTANDING THE ROLE OF HUMAN RIGHTS

8.5.1 From legal pluralism, consciousness, & alienation to human rights pluralism, consciousness, & alienation

By now it becomes apparent that even in situations where human rights *law* is insufficiently able to deal with challenges of commodification and/or crimmigration, this does not mean that the human rights concept as a whole has become redundant per se. Due to their multi-dimensional nature, human rights are indeed not necessarily to be understood as legal constructs. They are a Brahma-faced phenomenon that faces four directions simultaneously, with only one face maintaining a clear legal perspective. In similarly identifying multiple approaches to the understanding of human rights,[99] Breakey likewise argues that "each approach captures a unique, common-sense – and, in principle, compatible – insight into why human rights warrant respect. *Acknowledging this compatibility illuminates the myriad different avenues for legitimacy human rights enjoy* […]".[100] As he simultaneously warns, however, this also means

97 Hazen, 2003, p. 14; B.M. Sullivan, 1999, p. 86.
98 See also Hazen, 2003, p. 7.
99 In fact, Breakey identifies seven instead of four approaches to human rights. See Breakey, 2018.
100 Breakey, 2018, p. 1 (emphasis added).

that human rights "are thereby opened for normative challenge" on all of these distinct fronts simultaneously.[101]

The concepts of legal pluralism, legal consciousness, and legal alienation are consequently aspects of, but cannot be the exhaustive fundament for, any holistic examination of human rights. These notions explore *law*, whereas, as the foregoing points out, human rights are not necessarily law. They therewith do not provide sufficient conceptual space to study the role and value of human rights in a holistic sense, as they do not allow for the inclusion of legitimate understandings of human rights *differently* than the understanding of human rights *qua* law. They thus do not allow for the conceptual inclusion of legitimate understandings of human rights as natural entitlements, protest values, or discursive constructs that do not have to, although may, relate to legal articulations of human rights.

In light of human rights' Brahma-face, any alternative response thus necessary needs to rely on broader conceptual notions that may, nevertheless, be modelled in accordance with legal pluralism, legal consciousness, and legal alienation. Such response, it is argued here, needs to be based on notions that can be best described as *human rights pluralism, human rights consciousness,* and *human rights alienation*. They concern not the existence of multiple *legal* orders or "what people do as well as say about *law*",[102] but rather the existence of multiple *human rights* orders and what people do as well as say about *human rights*. Based on a pluralist understanding of human rights, 'human rights consciousness' and 'human rights alienation' should be understood as much broader concepts in the sense that they concern not just the legal paradigm of human rights but also other, concurring paradigms that determine the way in which human rights play (or do not play) a role in practice. This means that they are able to conceptually grasp the influence of both 'human rights' understood as grounded in legal norms, as well as 'human rights' understood as grounded in morality, in social struggle, or in discourse. As a consequence, the examination of *legal* pluralism and of peoples' use (or non-use) of human rights *law* is but one aspect of the broader inquiry into the impact of *human rights* pluralism and of people's use (or non-use) of *human rights*. Fiske eloquently sums up this distinction between human rights and human rights law:

> "Human rights […] is likely to lead one to think about human rights law – the bodies of jurisprudence at national, regional and international levels […]. Human rights [however] also exist beyond legal positivism; they have power as an idea, a set of values and ethics, and provide a language with which to articulate wrongs and legitimise opposition to lawfully enacted injustices. While human rights in

101 Breakey, 2018, pp. 1–2.
102 Silbey, 2008 (emphasis added).

> this sense do not carry the same enforceability as legally based rights, they can be powerful nonetheless."[103]

The quest therefore should be about human rights pluralism, consciousness, and alienation. The point of departure, then, is linked to what has occasionally been explored as the 'sociology of human rights': rather than a doctrinal legal focus on international law, this branch of scholarship situates human rights claims firmly in society.[104] It puts aside any idealistic perspectives in favour of an understanding of human rights rooted in social practice and manifest outside the law.[105] The approach taken here is consequently an alternative not only to the conventional model of positivist doctrinal human rights theory but also to socio-legal approaches. It indeed recognises (i) that human rights are not only legitimately grounded in legal instruments, but also in morality, social struggles, and discourse, (ii) that they are not only to be achieved through traditional legal practice including advocacy, litigation, and treaty monitoring, but can also be achieved through practices that are based on frameworks of morality, social struggle, or discourse instead, and (iii) that in any attempt to achieve them, human rights may instrumentally be used as a deliberative, moral, protest, or discursive tool.

This distinction between human rights as legitimately *grounded* in either of the four dimensions (i.e. in deliberations, morality, social struggle, or discourse), human rights as *accomplished through* either of the four dimensions (i.e. through deliberations, morality, social struggle, or discourse), and human rights as instrumentally *used* in either of four ways (i.e. as deliberative, moral, protest, or discursive instruments) is crucial. Indeed, as a further complication, in interpreting the model of human rights promulgated here it is important to realise that the four-dimensional conceptualisation of human rights essentially addresses these three issues simultaneously. To refer back to the conceptualisation of human rights as a Brahma, human rights can thus be *understood* from four perspectives (i.e. Brahma's four heads being turned into four different directions), can be *vernacularised* through four mechanisms (i.e. the four arms of Brahma, each pointing in a different direction), and can be *used* for such vernacularisation in four ways (i.e. the ritual objects that Brahma is holding, each representing a different praxis). Each dimension hence comprises respectively a *constitutive,* a *directional,* and an *instrumental* component.[106] These will now be explicated in turn.

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103 Fiske, 2016, p. 8.

104 Frezzo, 2015.

105 Clément, 2015, p. 564.

106 Compare Garth & Sarat, 1998, who identify a dual functionality in relation to legal frameworks. They thus explain how 'law' can be both a constitutive that shapes our understanding of the world, *and* an instrument to accomplish particular purposes. Here, in a similar vein, it is argued that such dual functionality can be identified in relation to the four-

8.5.2 The dimensions' constitutive function: four human rights consciousnesses

On the basis of the foregoing, it becomes apparent that "[i]ndividuals develop a consciousness about myriad social and structural entities, including the law"[107] *and*, it may be added here, human rights. In turn, all four dimensions of the model of human rights have a constitutive function in that each dimension promulgates a respective legitimate *human rights consciousness.* The model thus informs us that human rights can be *grounded* in either of the four dimensions, and that whilst legal articulations are often hegemonic, they are not the only option available. Put differently, the production of human rights meaning can be based on either law, morality, social struggle, or discourse: each of these four sources can be the basis for human rights interpretations that are (re)produced, sustained, or amended through social participation and interpretation.[108] Similar to legal consciousness, human rights consciousness is thus inherently subjective and heterogeneous.[109]

8.5.2.1 The four bases for human rights consciousness

First, human rights may be identified on the basis of (international) human rights law as codified 'in the books' and as developed through jurisprudence. In this sense, they are *deliberative principles:* they are based, in other words, on the deliberative efforts that have taken place in codifying, consolidating, and developing human rights on the legal plane. Given the ongoing hegemony of legal human rights articulations, more often than not people rely at least in part on the deliberative dimension in their human rights understanding. From this perspective, human rights consciousness is based on the codification of norms: human rights are understood, at least in part, in the way that they have been codified and developed through deliberative processes.

The second human rights consciousness may be based on a moral paradigm of human rights: thus, human rights may be identified on the basis of moral principles of justice and fairness. This consciousness, then, revolves around human rights as *natural entitlements*. According to a quintessential natural consciousness, human rights entitlements derive from a transcendent plane,

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dimensional human rights notion. What is added here, however, is the directional function of each dimension.

107 Fritsvold, 2009, p. 803.

108 Compare Silbey, 2008.

109 Compare McCann, 1994, p. 283. See, for a powerful appraisal of the existence of different human rights consciousnesses that do not always neatly coincide with international human rights law, the work of Van der Kroon on Panamese indigenous Ngäbe-Buglé children who migrate from Panama and work on Costa Rican coffee fields: Van der Kroon, 2015.

whether it be a divine entity or an abstraction such as 'humanity' or 'reason'.[110] Any understanding premised on this dimension is thus ultimately based on faith, that is, on the identification of norms of morality that are dictated by a higher, transcendent source.

Third, human rights consciousness can result from human rights understood as *protest values*. Human rights in this sense may be identified on the basis of the needs of the underclass and their according social struggles. As Levitt and Merry point out, "the idea of human rights becomes broader, escaping the original parameters of the legal documents. […] As social movements seize these ideas and wrestle with them, they make them something new."[111] From such a perspective, human rights claims thus may arise as a response to structural inequalities and injustices and do not, necessarily, align with those rights that are protected through the domain of human rights law that is, as previously mentioned, viewed with suspicion.[112]

Finally, human rights may be identified on the basis of dominant discourses. In this sense human rights consciousness is modelled in accordance with human rights understood as *discursive constructs.* The way in which human rights are authoritatively discussed, debated, framed, talked about, promulgated, and ignored thus shapes one's human rights consciousness based on this dimension. In other words, depending on the most dominant and/or appealing discourses available, a particular consciousness of human rights may arise. Still, the embedding of such understanding in rights talk makes it difficult to define with sufficient authority what human rights are and how they can objectively be recognised.[113] Nussbaum, elaborating upon the limitations of rights talk, points out that the language of rights therefore is not particularly informative "unless its users link their reference to rights to a theory".[114]

The latter three bases for human rights consciousness do not require a corresponding legal duty in order to enjoy legitimacy, and even if such a corresponding legal obligation exists, it does not have to be as broad and encompassing in scope. In other words, it is very well possible for collectivities and individuals to consider that a person is entitled to a certain 'human right' as legitimately grounded in morality, social struggle, or discourse, even if such right does not have a corresponding legal obligation. Conversely, these four dimensions may, in their constitutive capacity, also inform human rights alienation. Thus, depending on situational context, each of the particular human rights consciousnesses may be regarded by members of the public as

110 On occasion, some natural scholars resort to legal consensus as proof and proxy of universal and transcendental human rights entitlements: Dembour, 2006, pp. 5–6.
111 Levitt & Merry, 2009, p. 460.
112 Dembour, 2006, p. 254, 2010, pp. 3, 6.
113 Ritter, 1996, p. 266.
114 Nussbaum, 1997, p. 275.

alien, distant, and threatening to their own customs and belief systems.[115] On this basis, collectivities and individuals may be alienated from such norms and may, consequently, not experience and not perceive them as vital parts of their everyday lives. In fact, the availability of multiple consciousnesses of human rights allows them to go on what Klabbers and Piiparinen call a "normative-order shopping spree":[116] they may purposively alienate *particular* human rights consciousnesses yet may adhere to others, which allows them to frustrate the effective vernacularisation of specific human rights consciousnesses whilst at the same time unabatedly valuing the importance of human rights conceived of in alternative ways. This relates to what de Tocqueville already pointed out in *Democracy in America* when discussing the potential despotism in democratic nations: as he envisages, enlightenment and equality based on centrally provided entitlements do not necessarily spur individuals' concern for humanity as a whole, but may rather result in self-serving attitudes. Thus,

> "I see an innumerable crowd of like and equal men who revolve on themselves without repose, procuring the small and vulgar pleasures with which they fill their souls. Each of them, withdrawn and apart, is like a stranger to the destiny of all others: his children and his particular friends form the whole human species for him; as for dwelling with his fellow citizens, he is beside them, but he does not see them; he touches them and does not feel them; he exists only in himself and for himself alone".[117]

In this sense, modern conceptions of equality and freedom may foster strong alienation of grand equality ideals amongst a citizenry that is primarily concerned with a very narrow-minded, self-serving idea of human rights.

8.5.2.2 The construction of 'unique' human rights consciousnesses: norm internalisation and norm socialisation

The foregoing makes clear that the construction of human rights meaning is highly context-specific and subjective. Given the heterogeneity of the construction process, human rights consciousnesses may indeed vary widely as to their substance from community to community and even from individual to individual. Arguably, this will be least the case in relation to the consciousness of human rights as deliberative principles, as these can be deduced from available sources including legal instruments, statutes, and case law.[118] The

115 Compare Engel & Engel, 2010, p. 76; Hertogh, 2018, p. 14.
116 Klabbers & Piiparinen, 2013, pp. 27–28.
117 De Tocqueville, 2000, p. 663.
118 At the same time, however, it should be appreciated that the substance of human rights law may differ from region to region, depending on domestic constitutional differences, the existence of regional treaties, and ratification of international instruments. In this sense, the meaning of human rights understood as deliberative principles may still depend

domain of morality, on the other hand, will – due to its metaphysical nature – on many occasions lead to the identification of different sets of human rights by different groups and different individuals: concepts of justice and fairness may, indeed, be substantiated in completely different ways depending on one's social context and belief systems. Likewise, in constructing the understanding of human rights as protest values, any precise delineation will depend on one's identification of an alleged 'underclass' as well as on one's experiences with, and perspectives on, the proper needs of those involved in social struggle.[119] In a similar vein, the identification of human rights on the basis of dominant discourse ultimately depends on contextual specifics as distinct discourses may dominate different sociocultural environments and the idea of discursively constructed rights may thus be substantiated in multiple, context-specific manners.

To complicate matters further, since the formation process through which human rights consciousnesses are formed is highly heterogeneous and subjective, people do not necessarily rely, nor necessarily primarily rely, on only one of the four dimensions. To the contrary, whilst consciousnesses may be shaped in light of the law in the books, moral frameworks, social struggle, or discursive statements, it is also possible that individuals' formation processes are influenced by various of these sources simultaneously. Given the dynamic nature of producing consciousness, it is even very unlikely that the consciousness of an individual is solely based on one source.[120] Human rights consciousnesses thus on many occasions will be highly unique (and sometimes even contradictory), in that they combine elements of various of these sources to arrive at highly individualised understandings of human rights. In this process, the various sources may have a mutually strengthening effect –where human rights identified on the basis of one source corroborate with human rights identified on the basis of another source, therewith being reciprocally legitimising – but may also have a mutually weakening effect – where human rights identified on the basis of one source conflict with human rights identified on the basis of another source, therewith questioning one another's legitimacy. An example of the former would be where a certain deliberative understanding of human rights as deduced from the codified law is corrobor-

significantly on contextual specifics. Furthermore, significant ambiguity continues to exist concerning the material scope of specific human rights instruments as well as concerning the proper addressees and beneficiaries of obligations respectively rights. Such ambiguities can be exploited to arrive, based on one's belief system and agenda, at context-specific understandings that represent not necessarily the sole potential interpretation. Even in relation to a deliberative consciousness, based on the existence of consultable sources such as codified norms and jurisprudence, no singular set of rights can thus categorically be identified and debate about the question what these human rights precisely entail continues to exist.

119 See also Ambrosini & Van der Leun, 2015, p. 111.

120 Compare Fritsvold, 2009, p. 804.

ated by a moral understanding of human rights as premised on a metaphysical conviction. Conversely, an example of the latter would be where dominant discourse marginalises the human rights entitlements of certain 'underclasses' and therewith detracts from notions of human rights as based on protest and social struggle.

The question, then, is how individuals arrive at particularly constructed human rights consciousnesses. To grasp this process, the concepts of 'norm internalisation' and 'norm socialisation' should be introduced here. 'Norm internalisation' refers to the process by which an individual (or, for that matter, any actor) first learns about certain norms that potentially apply, consequently learns why such norms are important or sensible, and on the basis of such information ultimately accepts the norm as his or her own viewpoint.[121] The way in which individuals learn about such norms may differ widely: they may, for instance, derive from the legal plane, from religious doctrine, from particular philosophies, from reason, or from life experience. Likewise, the normative importance or sensibility of such norms may be based on a wide variety of authorities, including, again, the law, religion, reason, experience, and so on.

Such internalisation processes are frequently denoted as being part of a broader process of norm socialisation, that is, not only the *internalisation* of norms through learning processes but also the subsequent *confirmation* of such norms through behaviour, attitude, and, ultimately, the transmittal of such norms to new generations.[122] In this sense, norm internalisation is a circular process in that individuals are not only "socialised into internalising norms",[123] but also in turn socialise others into internalising norms. Through norm socialisation the internalised norms hence become part of one's personal culture.[124] Fritsvold reports in this regard that the formation of a personal culture is, however, not static as consciousnesses may develop on the basis of professional and personal experiences and evolving socialisation processes.[125] In turn, Finnemore and Sikkink point out that, quite paradoxically, norm internalisation may gain influence where its visibility fades:

> "At the extreme of a norm cascade, norms may become so widely accepted that they are internalized by actors and achieve a 'taken-for-granted' quality that makes conformance with the norm almost automatic. For this reason, internalized norms can be both extremely powerful (because behavior according to the norm is not questioned) and hard to discern (because actors do not seriously consider or discuss whether to conform)."[126]

121 Jinks & Goodman, 2003, p. 1752; Koh, 1997, p. 2646.
122 Maccoby, 2015, p. 3. See more generally, on the distinction between internalization and behaviour, Olkinuora, 1972, p. 228.
123 Tepe, 2012, p. 17.
124 Maccoby, 2015, p. 3. See also E.A. Ross, 1919.
125 Fritsvold, 2009, p. 803.
126 Finnemore & Sikkink, 1998, p. 904.

In sum, through norm internalisation and socialisation, human rights understandings may become proper – albeit non-static – human rights *consciousnesses* of individuals or collectivities. In turn, such consciousnesses guide the positions, mentalities, and behaviours of those individuals or collectivities concerned, therewith opening up scope for effective vernacularisation of such consciousnesses (an, on the other hand, for effective alienation of other consciousnesses). By extension, whilst *any* human rights consciousness can be translated into actual protection through vernacularisation mechanisms as will be discussed below, widely shared and accepted consciousnesses may be particularly influential given that they may operate, almost invisibly, as powerful and ingrained elements of social interaction.[127]

8.5.3 The dimensions' directional function: four human rights vernacularisation mechanisms

The second aspect of the four-dimensional model of human rights is that each dimension fulfils a *directional* function. That is to say, each of the four arms of Brahma points in a different direction, marking different routes for the effective vernacularisation of human rights consciousnesses. Thus, deliberations, morality, social struggle, and discourse do not only provide fertile bases for distinct human rights consciousnesses, but also provide processes through which these different human rights consciousnesses can be *vernacularised.* Whenever individuals or collectivities are conscious about the salience of a set of human rights as identified on the basis of one or more of the four dimensions, they in turn can vernacularise these standards by translating them, through one or more of the mechanisms offered by the respective dimensions, into their local norms, cultures, practices, and traditions. Conversely, whenever individuals or collectivities are alienated from a set of human rights as identified on the basis of one or more of the four dimensions, they in turn can prevent vernacularisation of these standards by purposively inhibiting their local translation. It should hence constantly be kept in mind that the various dimensions may not only be used to *increase* protection of human rights, but also to achieve the complete opposite. Again, the four-faced approach concerns not only human rights protection, but reflects in a more encompassing fashion

127 Notwithstanding their importance for human rights protection, norm internalisation and norm socialisation remain, however, largely underexplored in the context of human rights. Whilst Risse & Sikkink did previously raise the question what the conditions are "under which international human rights norms are internalized in domestic practices", they approached this question by looking at norm internalisation and socialisation by *states*: Risse & Sikkink, 1999, p. 1. Occasionally, the role of human rights activists in human rights internalisation has also been considered: see González, 2016, p. 383.

on the impact – be it positive or negative – of human rights in a particular context.

Human rights protection may thus flow from various, largely incomparable vehicles. It accordingly becomes clear that the pursuit of effective human rights protection may be constrained by varying preconditions, depending on which vernacularisation mechanisms are employed. For instance, mechanisms belonging to the natural, protest, or discourse dimension are not *a priori* bound by the same constraints that are imposed on deliberative processes, and therefore can move *beyond* these constraints in pursuing the effective materialisation of human rights protection. This, then, provides ample ground to move beyond the legal impasse identified in Part II of this book. The different ways in which the dimensions can function as vernacularisation mechanisms will now be addressed in turn.

8.5.3.1 Human rights through deliberative processes

The first way in which human rights can be vernacularised is through deliberative processes. This is pretty straightforward in that it is commonplace to consider that human rights can be effectuated through the workings of the law. It is, henceforth, through the mechanisms of allocating responsibility, inducing answerability, and effectuating enforcement that human rights may be vernacularised and accomplished in a deliberative manner.

Importantly, this may include processes within the square domain of international human rights law, but may also include processes within domains that are merely affiliated, such as domestic criminal or tort law. Human rights consciousnesses may therefore be vernacularised through deliberative processes, even where these processes do not concern square international human rights law, that is, where international human rights law is not used as a *tool* – to be discussed later in this chapter – as such. In this sense deliberative processes do not provide one but multiple routes to vernacularisation: different legal domains including international human rights law may, or may not, provide leeway for the vernacularisation of human rights consciousnesses. In turn, human rights consciousnesses may be vernacularised through various specific deliberative processes that are related to the creation and enforcement of legal norms, including not only legal proceedings but also, for instance, the drafting of legislation.

Ultimately, *whether* one turns to deliberative processes in order to vernacularise a human rights consciousness depends on one's perspective of such processes and of law more generally. A brief return to the notion of legal consciousness illuminates this point further. Work by Ewick & Silbey as well as Fritsvold shows that people's understanding and use of the law can be classified as belonging primarily to either of four categories, although such legal consciousnesses may, at times even in a contradictory fashion, draw on

various categories simultaneously.[128] Thus, people may conceive of the law as an abstract, neutral, and static entity (they consider themselves to be '*before the law*'), as a game that requires resource mobilisation and strategy for victory (they consider themselves to play '*with the law*'), as a commodity of power that cannot genuinely resolve disputes, recognise truth, or respond to injustice as it does not produce equitable outcomes for others than those in power (they consider themselves to act '*against the law*'), or as a vitally corrupt legal system that veils the illegitimate nature of the corrupt social order and that represses any dissent movement (they consider themselves to be '*under the law*').[129] Whilst the latter two categories seem to somewhat overlap, their difference rests in the fact that an 'against the law' perspective "observes that the law often fails as an asset to achieve justice" whereas an 'under the law' perspective "views this failing as intentional and perceives law as an active agent of injustice".[130]

Transposed to the context of the vernacularisation of human rights consciousnesses through deliberative processes, this means that one's perception of law and legal processes will influence (i) *whether* one engages in processes belonging to the deliberative dimension, and, if so, (ii) *how* one engages in such processes.

Thus, first, where deliberative processes are for instance viewed from an 'against the law' perspective, people may deem such processes as ineffective to vernacularise their human rights consciousnesses and may consequently decide to turn to other mechanisms instead. Second, where individuals *do* decide to engage in deliberative processes, they may do so depending on whether they view themselves as 'before', 'with', 'against', or 'under' the law. Those considering themselves to be 'before the law' may have no difficulties in relying on deliberative processes' authoritativeness as an autonomous, objective, hierarchical, and rational system and in this sense may consider the legal system a proper mechanism for vernacularisation insofar as their own human rights consciousness aligns with the values fostered through deliberative processes. Alternatively, those considering themselves to be playing 'with the law' may likewise consider deliberative processes to be appropriate vernacularisation mechanisms insofar as sufficient resource mobilisation and proficient strategies are available. Third, those considering themselves to act 'against the law' may, instead of relying on other vernacularisation mechanisms, still turn to deliberative processes in an attempt to "appropriate part of the law's power".[131] Finally, those considering themselves to be 'under the law' are unlikely to turn to deliberative processes altogether, as they call for a revolution in overturning the entire legal system and the corrupt social

128 Ewick & Silbey, 1998; Fritsvold, 2009.
129 Ewick & Silbey, 1998; Fritsvold, 2009, pp. 804–805.
130 Fritsvold, 2009, p. 806.
131 Ewick & Silbey, 1998, p. 28; Fritsvold, 2009, p. 805.

order that is purportedly serves. Rather, they may "engage in flamboyant acts of instrumental lawbreaking for the purpose of symbolic or actual subversion".[132]

8.5.3.2 Human rights through implemented frameworks of morality

The second way in which human rights consciousnesses can be vernacularised is through mechanisms that are based on, or that are closely affiliated with, frameworks of morality. Such processes differ fundamentally from deliberative vernacularisation mechanisms in that they are largely non-institutionalised. That is to say, whereas deliberative processes occur in highly institutionalised environments, i.e. through legislative bodies, intergovernmental fora, diplomatic exchanges, courts, arbitrators, and so on, processes of morality largely lack institutionally embedding but operate through dynamic processes of decision-making that will be further explored below. Processes of morality are therewith not collectively identifiable on the basis of their institutional characteristics, but rather on the basis of their socialisation capacities: they are categorically unified in the sense that they concern subjective processes through which the alleged distinction between 'good' and 'bad' is enforced. This, in turn, essentially revolves around the notion of *choice*: these processes operate on the basis of discretionary *choices* in favour of a particular morality, or consciousness.

Such processes therefore can operate on the basis of any of the four human rights consciousnesses: human rights understandings grounded in either of the four sources can be assigned with moral capacities through the processes of internalisation and socialisation and can, subsequently, be effectuated through decision-making practices of individuals and collectivities along ostensibly moral lines. By extension, they can be based on the *alienation* of any of the four human rights consciousnesses: where particular understandings of human rights are *not* conceived of as morally justified, processes of morality can prevent their effective vernacularisation in practice by the vernacularisation of other, competing norm systems instead.

Morality as a vernacularisation mechanism thus revolves around the extent to which individuals or collectivities effectively have a *choice* to act in accordance with their own unique human rights consciousnesses in order to accomplish them in practice. In this sense, the mechanism of morality taps into people's everyday encounters, lived experiences, and practical efforts.[133] In turn, its impact may be considered particularly significant in actual contexts that are considered human rights-sensitive. That is to say, the vernacularisation of human rights consciousnesses through practices of decision-making in which sufficient room for moral choice is embedded may be deemed particularly

132 Fritsvold, 2009, p. 807.
133 See also Ife, 2009, p. 112.

powerful where, for instance, professionals working in settings of confinement are concerned. Their decision-making, indeed, may matter significantly for the effectuation of human rights, however defined, as through their activities notions of human rights may become "grounded in day-to-day lived experience".[134] Whilst largely underexplored, support for such claim in the context of confinement can *inter alia* be deduced from the work by Bosworth on immigration detention in the UK.[135] She found that "staff members frequently express considerable concern over the detainees' well-being and happiness and are worried by those whose stay is lengthy", indicating a self-standing concern for inmates' dignity, worth and wellbeing amongst employees and hinting at the importance of such considerations for the decision-making practices of these individuals.[136] There is henceforth particular reason to look at human rights internalisation by the 'boots on the ground': it are those individuals that, at the micro-level, may make a practical difference through moral processes on the basis of internalised human rights consciousnesses.[137]

To study such mechanisms, we should turn to the topic of 'discretion', or, more specifically, that of 'discretionary decision-making'. This term can be defined as relating to "the freedom, power, authority, decision or leeway of an official, organization or individual to decide, discern or determine to make a judgment, choice or decision, about alternative courses of action or inaction".[138] Van der Woude emphasises that discretion in this sense revolves around choice: an individual endowed with power and authority should, for discretion to come into play, be able to choose either the end to be pursued or the appropriate means or standards to achieve a predetermined goal.[139] The exercise of power is thus not only shaped by rules created in frameworks of legislation or policy, but also by the way in which individuals operating within such systems give, through their human agency, substance to the leeway that the applicable rules allow.

Importantly, this does not necessarily mean that "discretionary decision-making refers to deciding to act or not when the circumstances legally allow for it",[140] since exercises of discretionary power can also amount to endeavours that either implicitly or explicitly *challenge* the standards set by law and policy. Discretion is thus legally and policy-wise embedded yet is not necessarily congruent with such embedding at all times.[141] This process is, for example, very visible at what has been labelled the 'street level', where broad

134 Ife, 2009, p. 140.
135 Bosworth, 2011b.
136 Bosworth, 2011b, p. 166.
137 Compare Beijersbergen et al., 2015; Molleman & Van Ginneken, 2013, 2015; T. Ugelvik, 2016b.
138 Gelsthorpe & Padfield, 2004, p. 3.
139 Van der Woude, 2016, p. 10; van der Woude & van der Leun, 2017, p. 30.
140 Van der Woude, 2016, p. 9.
141 See for a different perspective on the definition of discretion, Hawkins, 2014, p. 188.

legislative and policy frameworks interact with, and are translated to, on-the-ground realities. It is at this level "where discretionary power not only permits the realization of the law's broad purposes, but where officials sometimes are allowed or even encouraged to distort the word or spirit of the law or policy, *or to ignore them*".[142] Such decision-making may be based on the preconceptions and motivations of street-level bureaucrats: "[w]hile not all powerful, they tinker with law and cases until they find an (in their view) acceptable and often pragmatic solution".[143] Street-level bureaucrats are on many occasions therefore the 'real policy-makers', since their actions effectively determine what is going to happen with specific individuals or situations as a matter of course.[144] That is not to say, of course, that individuals can unboundedly engage in decision-making practices that are at odds with circumscribing legal and policy frameworks: to the contrary, individual decision-makers may at times experience adverse consequences of non-compliant choices in the exercise of their discretion. Whilst this does not make the exercise of such non-compliant discretion less real or powerful, it does to a certain extent conditionalize the rational decision-making process that precedes the exercise of power.

The exercise of discretionary power is, from this point of view, inherently flexible and may be shaped both by legal contours, lacking or inefficient institutional oversight, and personal motives.[145] The way in which individuals precisely exercise their discretion through their human agency is therefore often determined on the basis of a complicated mix of motives, experiences, and applicable norms. In this sense, "a connection needs to be forged between forces in the decision-making environment, and the interpretive processes that individuals engage in when deciding a particular case".[146] Legislation, policy, alternative or even competitive applicable norms such as those of the organisation within which an individual operates, his or her previous professional and/or personal experiences, existing personal relationships with other individual stakeholders, and pre-existing or developing individual attitudes and perceptions related to more abstract concepts such as justice and fairness all may play a role in this process.[147] Van der Woude points out that any study of discretionary decision-making thus should incorporate three levels: (i) the broad social and political contexts within which discretion is applied (or the 'social surround'), (ii) the legal and organisational frameworks

142 Van der Woude, 2016, p. 11 (emphasis added). See also Lipsky, 2010.
143 Eule et al., 2019, p. 81.
144 Discretionary power thus has a significant influence on the structure and continuity of other individuals' lives and opportunities and on their relationship with 'the state' as a more abstract entity: see Lipsky, 2010, p. 4. See also J. Brouwer et al., 2018, p. 450.
145 Discretionary decision-making henceforth does not take place in a vacuum but is constrained both by external power relations and by internal moralities. See also Eule et al., 2019, pp. 81–83.
146 Hawkins, 2014, p. 189.
147 See also Van der Woude, 2016, pp. 14–15.

that are supposed to circumscribe the exercise of discretion (or the 'decision field'), and (iii) the individual's frame of decision-making which ultimately is modelled in accordance with personal beliefs, attitudes, and a "moral blueprint" (or the 'decision frame').[148]

Any internalisation of human rights consciousness can be presumed to at least partially determine an individual's decision frame, as it are these norms that ultimately give substance to one's 'moral blueprint'. The internalisation of human rights consciousnesses by individuals working in human rights-sensitive environments, including settings of confinement, therefore has a significant potential of materialising into effective *de facto* protection through the exercise of discretionary power.[149] Even where their operations are circumscribed by legal provisions, they may "interpret, construct, and ignore the law in daily practice" on the basis of their moral convictions.[150] As Eule et al. contemplate in the migration context,

> "[t]he discretionary spaces of law enforcement also enable state officials and others exercising power over migrants' prospects to retain the possibility of actively asserting their personal moral and political agency and aligning law enforcement with their values."[151]

Of course, it may be argued, this may lead to a certain level of arbitrariness given that human rights consciousnesses are unique and therewith may differ from person to person. Whilst this is true, it still is not a reason to exclude these processes when analysing the holistic vernacularisation of human rights norms: the fact that such arbitrariness may raise questions from a *normative* point of view does not detract from these processes' *empirical* significance. In addition, a modest level of arbitrariness could be normatively justified: the idea that human rights need to be constantly defined, negotiated, and enacted in different contexts has in fact been argued to be central to community development-based understandings of human rights.[152] Even more so, in line with the work of Ife, this conceptual 'openness' of the vernacularisation process is ultimately beneficial for proper human rights 'from below': it allows, right at the forefront, for the effectuation of human rights consciousnesses that are grounded in specific realities and that move beyond static, abstracted, and/or generalised conceptions.[153]

Discretionary decision-making in this regard should not be mistaken to necessarily be of grand character simply because it is instigated by what is considered as a morally superior and utopian framework: to the contrary,

148 Van der Woude, 2016, p. 16. See also J. Brouwer et al., 2018, p. 450; Hawkins, 2014, p. 189.
149 See, on discretionary power in contexts of confinement, also Liebling, Price, & Shefer, 2011.
150 Chiarello, 2013, p. 429.
151 Eule et al., 2019, p. 219.
152 Ife, 2009, pp. 139–140.
153 Ife, 2009, pp. 139–143.

many discretionary decisions based on a human rights compass may appear insignificant or even banal at times but one way or the other may have a "tremendous impact" on those with precarious status.[154] For example, discretion can vernacularise particular human rights consciousnesses by interpreting individual job-related tasks from a human rights perspective, by taking human rights norms into account in formal and informal decision-making practices, by countering harmful impacts of law and policy, and by minimising their harmful effects.

Likewise, the *alienation* of certain human rights consciousnesses can be presumed to have a similar impact on one's decision frame, albeit with the opposite result. Discretion can, indeed, also be appropriated to counter human rights consciousnesses, for example by minimising or neglecting the importance of human rights norms and by accordingly diminishing any potential for effective vernacularisation. Even more so, competing norms may, through the same processes, be promulgated instead. Actors operating through morality mechanisms thus do not necessarily assign human rights with moral superiority; other frameworks of justice, or even frameworks that are blatantly unjust such as that of racism and inequality, may continue to guide individuals in their work. In this sense, both from a human rights perspective and more generally, discretionary decision-making can overall not be normatively acclaimed or denounced: the normative nature of discretion depends on its empirical appropriation and application.[155]

8.5.3.3 Human rights through protest activities

A third way to vernacularise human rights consciousnesses is through mechanisms that are connected to protest and social struggle. Vernacularisation through such mechanisms somewhat resembles vernacularisation through deliberative mechanisms as it frequently is embedded in an institutionalised or semi-institutionalised setting as will be further elaborated upon below. It also, however, closely relates to vernacularisation through morality mechanisms, since it relies on a normative strive to accomplish the 'good', however defined. Nevertheless, vernacularisation through protest and social struggle differs from vernacularisation through morality as the latter is based on what may be labelled an 'interpretive' approach whereas the former derives from a 'critical' source.[156] Vernacularisation flowing from the 'morality' dimension thus can be identified by looking at the way in which people translate a human rights consciousness into their everyday (working) life. Protection, then, flows from implicit or explicit internal *choices* made on the basis of cultural under-

154 Eule et al., 2019, p. 83.

155 See also T. Evans & Harris, 2004, p. 871; Van der Woude, 2016, p. 13; Van der Woude & Van der Leun, 2017, p. 30.

156 For this distinction, see also Ife, 2009, pp. 142–143.

standings: individuals interpret their social surround on the basis of their cultural preconceptions – of which human rights consciousnesses may be an important component – and act accordingly as this appears, upon interpretation, the right course of action in the given situation. Protection flowing from the 'protest' dimension, on the other hand, can be uncovered by looking at the way in which people, on the basis of their human rights consciousness, try to "address structures and discourses of inequality and oppression".[157] As such, this approach is much more critical and outwards looking in that it does not primarily address why people make certain *choices* in relation to their own behaviour, but rather how people proactively operate in order to create *change* in the *body politic*. Whereas vernacularisation-through-morality thus primarily relies on people *doing* good on the basis of internalised norms, vernacularisation-through-protest arises where people are oriented towards *achieving* change, focusing primarily on the impact of peoples' efforts in the broader political and social matrix rather than on their own behaviour in its own right.[158]

Change, then, assumes the presence of some form of movement, or, more precisely, *social* movement. Indeed, protest will often be shaped in accordance with the practices and endeavours of formal or informal social collectivities.[159] In his work on what he calls the 'rights revolution', Epp sketches this importance of social movements in shaping rights protection.[160] He develops the thesis that support structures of a more or less institutionalised kind are crucial to the development of rights protection regimes: the absence of social movements such as institutionalised NGOs, semi-institutionalised groups including supportive bar associations, and grassroots support groups would hamper the development of effective rights protection.

Social movements closely align to the 'protest' school given that they are "collective forms of protest or activism that aim to affect some kind of transformation in existing structures of power that have created inequality, injustice, disadvantage, and so on".[161] As such, social movements are "collective enterprises seeking to establish a new order of life".[162] However, as with the other four dimensions, social movement does not always result in more or better protection: in the context of human rights, this means that social movements are not necessarily progressive in nature but could also act on the basis of more conservative, reactionary, or regressive motivations and consciousnesses.[163] Whatever 'new order of life' is pursued thus depends on the nature of the

157 Ife, 2009, p. 143.
158 See also Ife, 2009, p. 143.
159 See also Ambrosini & Van der Leun, 2015.
160 Epp, 1998.
161 G. Martin, 2015, p. 1.
162 Blumer, 1969, p. 60.
163 G. Martin, 2015, p. 1.

social movement concerned, with each movement acting on the basis of what it considers to be 'the good' in terms of an utopian society. The "injustice frame" on which collective action is based accordingly may differ from social movement to social movement.[164] Notwithstanding these differences, overall, the field of human rights can be identified as a key area of contemporary and future concern for social movements – or, as one "where we might observe global civil society in action".[165]

All social movements, whether progressive or conservative in nature, have in common that they attempt to achieve change vis-à-vis the status quo – in terms of human rights, this means that they attempt to change the distribution and enjoyment of human rights. This is where vernacularisation within protest mechanisms takes place: human rights consciousnesses are translated into specific courses of action through which their effective implementation in the *body politic* is envisaged. The way social movements attempt to do so, however, may fundamentally differ. Some social movements take place within conventional political fora whereas others operate relatively autonomously.[166] In relation to both traditions, some general remarks can be made in relation to how they may vernacularise human rights through what has been labelled their 'repertoires of contention'.[167]

The repertoire of the former tradition, which operates within political confines, is constrained by the rules, customs, and conventions of such political arena: the options for contention are structured within the political realm along cultural and historic lines and are, therewith, limitative, although there is still room for strategic decision-making and social movement agency.[168] Tilly, likening social movements to *commedia dell'arte* and jazz rather than a quintessential classical ensemble, strikingly summarises that "people know the general rules or performance more or less well and vary the performance to meet the purpose at hand".[169] Examples of mobilisation strategies – as specific forms of vernacularisation processes – belonging to this tradition of social movement could include, depending on the situation, mechanisms of patronage, grievances, public meetings, marches, strikes, demonstrations, boycotts, and the use of new media technologies.[170] As Tarrow shows, the employment of such repertoires of contention can be intensified in periods when "opening windows for contentious politics" allow for "spirals of political opportunities and threats", a development that he calls the 'cycles of contention'.[171] Hence,

164 Benford & Snow, 2000, p. 615.
165 G. Martin, 2015, p. 242.
166 In scholarship, this has led to different normative perspectives on the role of social movements: see G. Martin, 2015, p. 5.
167 Biggs, 2013; G. Martin, 2015, p. 46; Tilly, 1986, p. 4.
168 G. Martin, 2015, p. 46; Tilly, 1986, p. 390; Williams, 2004, p. 96.
169 Williams, 2004, p. 96.
170 See also G. Martin, 2015, pp. 47–50.
171 Tarrow, 2011, p. 5. See also G. Martin, 2015, pp. 50–52.

whenever a politically opportune window for reform arises, social movements' application of their repertoire of contention may transform social and cultural matrixes and may ultimately result in major protest cycles and, simultaneously, sustained conflict with opposing actors including state authorities, private entities, and, last but not least, other social movements.[172] As such, the notion of 'cycles of contention' emphasises that social movements' mobilisation efforts within this tradition may constantly come and go depending on the existence and prospects of political windows of opportunity.

The employment of a repertoire of contention by the second tradition of social movements, i.e. those principally operating outside the confines and conventions of the political spectrum, is fundamentally different. Social movements operating outside political confines in fact gained prominence at a later stage, from the 1960s onwards, and they are therefore frequently labelled as 'new' movements.[173] These movements differ from those movements operating within political confines as their repertoire of contention is not limited to "institutionally imminent possibilities" but rather can be employed in relative autonomy from established political actors.[174] This is possible because these types of social movements do not actively pursue political mobilisation as part of a means-end oriented approach, but are rather geared towards revealing and exposing power that is "increasingly hidden or masked by operational codes, formal rules, and bureaucratic procedures and decision-making processes".[175] Thus, whereas the former type of social movements is largely defined by their *interaction* within the *body politic*, this type of social movements resides in the 'pre-political' dimension of collective action, that is, in everyday life, where it *challenges* the *body politic* by embodying an ostensibly genuine alternative.[176] The main goal is to symbolically confront the system and to provide an alternative way of 'naming the world' in order to reverse dominant codes, that is, to offer "another experience of time, space, interpersonal relations, which opposes operational rationality of apparatuses".[177] They hence redefine what it means to socially interact by showing how things could be different; as such, they practice what they preach by living the reality they are struggling to realise for the broader community. Whereas social movements operating within conventional political confines thus attempt to create change by affecting the existing political system and structures, social movements operating outside such confines attempt to create change by,

172 Thus, "changes in public political opportunities and constraints […] create the most important incentives for triggering new phases of contention for people with collective claims. These actions in turn create new opportunities both for the original insurgents and for latecomers, and eventually for opponents and power holders": Tarrow, 2011, p. 12.
173 Lichterman, 1998, p. 414; G. Martin, 2015, p. 61.
174 G. Martin, 2015, p. 68.
175 G. Martin, 2015, p. 67.
176 G. Martin, 2015, p. 67.
177 Melucci, 1984, p. 830.

frankly, *being* the change. Vernacularisation, in this sense, is a highly deontological endeavour. Nevertheless, this does not mean that social movements belonging to this category operate completely independently from political actors. As Melucci explains, they

> "by their very nature are ineffectual unless they work through the mediation of political actors. Constantly exposed to the twin risk of fading into folklore or terrorist desperation, they can only exist if their demands are interpreted by political actors capable of mediating them and rendering them effective vis-a-vis political decision-making. *The demands themselves, however, at the same time continue to exist beyond political mediation and independently of its results*, and thus to generate innovative energies."[178]

One way or the other, social movements thus ultimately need their claims to be heard in institutionalised political settings, although in this second tradition the social movement itself remains autonomous and largely outside the political domain. Such movements' aim is not to participate in social change as an institutionalised actor on the political plane, but rather to "make society hear their message and translate these messages into political decision making".[179] In this sense, this second tradition of social movements is all about *showing difference,* which only then may inform political processes*:* by diverging from standardised experiences, social movements embodied by organised collectives can autonomously challenge dominant cultural codes by raising the question as to the appropriateness of such codes – which, in turn, may or may not inform discussions at the political level depending on the extent to which such showcasing of difference is acknowledged.[180] Consequently, within this tradition, the formation of a collective identity is not simply a means to an end but is of intrinsic value, as such collective identities are not only instrumental mediums to convey a message but are also, crucially, the message itself.

The consequent question is what the repertoire of contention of this latter type of social movements precisely includes, or, in other words, through which mechanisms it can vernacularise particular human rights consciousnesses. Whereas the former tradition may rely on a range of instruments that are institutionalised within the *body politic*, this tradition's toolbox is less evident. Paradoxically, the main instrument that this type of social movements can use is that of mere existence: in this sense, this movement type's repertoire of contention is highly flexible (as it does not prescribe the techniques that should be used in the praxis of 'existing') *and* particularly constrained at the same time (as social movements are by and large limited in their contention efforts to that praxis of 'existing'). Indeed, the only tool that can really be

178 Melucci, 1996, p. 216 (emphasis added).
179 Melucci, 1985, p. 815.
180 See also G. Martin, 2015, p. 69.

utilised is that of deontology: social movements need to *be* (or *exist* and *behave*) in certain justified ways as to inform social change by proxy.

In turn, to bridge the gap between social movements' deontological practices and political change, conceptual frameworks such as 'bearing witness' may prove useful as mediating techniques. Thus, social movements may, through their endeavours, bear witness to specific injustices and inequalities in broader society precisely by embodying an alternative, which in turn may inspire observers to become involved in for example activism, anger, and/or compassion.[181] 'Bearing witness' is therefore a process that occurs on two distinct stages. First, social movements through divergent practices expose atrocities in society, a practice that can be labelled the 'indirect' bearing of witness. The precise practices involved may differ from situation to situation, but in the human rights context techniques such as *voicing* claims may be considered.[182] Second, when confronted with such anomalies, observers in turn may become cognisant of latent injustices in society and may accordingly bear witness in a more 'direct' sense, as the differences become painfully tangible through social movements' deontological endeavours. In fact, bearing witness in an indirect sense does not only unmask abominations but also makes it difficult for observers to close their eyes for such truths, even where inconvenient: the 'direct' bearing of witness occurs, henceforth, not always entirely on the basis of the observer's own volition. Observers are all of a sudden cloaked with responsibility, as denying or cold-shouldering injustices is no longer an option: "their awareness of the issue means that they may choose to act or not, but that they cannot turn away in ignorance".[183] This responsibilisation can trigger a variety of responses, including a blatantly apologetic stance or, conversely, a form of invigorated defiance.

8.5.3.4 Human rights through discourse

Finally, human rights can be vernacularised through discursive mechanisms. Such discursive processes can be defined as "an interrelated set of texts, and the practices of their production, dissemination, and reception, which brings an object into being".[184] In this sense, human rights consciousnesses may be vernacularised through the creation and communication of language and text: such processes have the potential of couching human rights in powerful terms and therewith may, through perception, impact upon empirical reality. Discourse has, in other words, the capacity to translate certain human rights consciousnesses into norms that impact upon everyday life by allocating such consciousnesses with discursive significance, therewith potentially securing

181 G. Martin, 2015, p. 129. See also Fleay & Briskman, 2013, pp. 114–115.
182 On the importance of voicing claims, see also Welzel, 2013, pp. 215–217.
183 Moser, 2003, p. 188.
184 Lindekilde, 2014, p. 198.

that such consciousnesses are, as it were, 'on the table' in relation to specific social relationships.

In fact, through discourse, a variety of ideologies and belief systems can be reproduced – in this sense, "language is not a neutral reflection of the world, nor of social relations or personal identities, but rather plays an active role in creating, maintaining and altering them".[185] As a result, the reproduction of ideologies and belief systems in discourse can under certain conditions be used to change empirical reality – *in casu*, it can be used to either vernacularise particular human rights consciousnesses or, conversely, to have a detrimental impact on such vernacularisation on the basis of alienation strategies. Indeed, again, discourse is flexible in that it can be used to pursue different ends, which ultimately depends on the motives, interests, and authority of the discourse-producing actors involved. In relation to alienation through discursive mechanisms, two strategies seem to exist: discourse may either refer to human rights in order to legitimise for instance policies or behaviours and preclude any subsequent human rights-inspired criticism, or it may *not* refer to human rights in order to marginalise their importance as an applicable framework altogether. The first of these strategies relies on an effective framing of 'human rights' and on the subsequent argument that the policy or behaviour at hand fulfils all criteria ('we comply with all human rights *identified in this particular way* and therefore any further criticism based on human rights is no longer valid'). Similar to deliberative processes, discursive practices in this sense may turn human rights into a thin layer of veneer that largely covers – and legitimises – policy practices. The latter of these strategies, on the other hand, relies on the purposeful omission of the human rights framework as an applicable normative order altogether ('a range of issues are important in this context [of which human rights is not primarily one], by focusing our language around these issues, they become the key matters at hand'). Discourse can, in this way, be used to alienate and silence human rights claims either by redefining what human rights purport to or by redefining the benchmarks altogether.

Ultimately, vernacularisation of human rights through discourse thus revolves around discursive dominance, as it is the dominant discourse that may induce, or reduce, compliance with particular human rights consciousnesses. Discursive endeavours therefore should be understood as being part of a constant battle over the question how social reality should be defined and understood.[186]

185 Van Berlo, 2015a, p. 82. See also Lupton, 1992; L. Phillips & Jørgensen, 2002.
186 Lindekilde, 2014, p. 206.

8.5.4 The dimensions' instrumental function: four human rights instruments

Finally, on the basis of the four-dimensional model, human rights may fulfil four different *instrumental* functions. That is to say, a particular human rights consciousness can potentially be vernacularised – or, conversely, be alienated – through either of the four dimension-specific vernacularisation mechanisms, *and in doing so human rights in either of four ways may constitute useful instruments for effective vernacularisation – or for effective alienation*. In vernacularising or alienating consciousness, one henceforth may – but does not necessarily have to – rely on the instrumental value of human rights as law, natural entitlements, protest, and/or discourse. To refer back to the Brahma conceptualisation of human rights, the perspective of one of the four Brahma faces (or a combination of perspectives) may be vernacularised through one or more of the four directions that Brahma points towards by using one or more of the four ritual objects that he is holding. These various instrumental values of human rights will now be discussed.

8.5.4.1 Human rights as deliberative principles

First, human rights may be used as deliberative instruments – that is, by *relying* on human rights as law. Such *use* of human rights law can be expected to take place first and foremost in the application of deliberative vernacularisation mechanisms. Thus, in the pursuit of a particular human rights consciousness, one may employ human rights law through legal processes. Here, the difference between the 'law in books' and the 'law in action' is of primary relevance.[187] This distinction has already been addressed in Part I of this book and purports to conceptually explain that for human rights law to be effective, power bearers should not only bear responsible *de jure* ('law in books') but should also be held accountable *de facto* ('law in action'). From the perspective of human rights effectiveness and accountability, it is therefore not sufficient that international human rights law determines which actors are responsible under what conditions, but such legal allocation of responsibility should also be met with sufficient answerability and enforcement in practice.

The various specific processes of each of these mechanisms have extensively been discussed in the literature, including human rights treaty drafting,[188] the creation and operation of soft-law norms,[189] domestic, regional, and inter-

187 Pound, 1910.

188 See e.g. A. Buchanan, 2013, pp. 204–209; McGreal, 2012; Morsink, 1999. See more generally also Seidman, Seidman, & Abeyesekere, 2001.

189 See e.g. the edited volume by Lagoutte, Gammeltoft-Hansen, & Cerone, 2014. See more generally also Chinkin, 1989.

national treaty monitoring,[190] human rights litigation,[191] opportunities – albeit limited in scope and mainly focused on domestic legal pathways in the US – for class actions,[192] and the role of human rights in dispute settlement mechanisms.[193] Such accounts do not need to be revisited here. Instead, it should be emphasised that legal processes in which human rights law is used as a tool provide, at least in theory, ample space for human rights vernacularisation, that is, for the translation of a particular conception of human rights into practical applicability through legal norms, legal answerability, and legal enforcement.

Notwithstanding this emphasis on practical applicability, it would be a mistake to consider that the use of human rights law as an instrument to vernacularise human rights consciousnesses through legal mechanisms only involves processes that belong to the operation of the 'law in action'. To the contrary, processes by which the 'law in the books' is created and amended are equally important to take into account: the instrumental role of human rights as deliberative standards stretches, insofar as their use in deliberative processes is concerned, from the very beginning of the process of codification where ideas for human rights law are sparked, up until the end of the process of enforcement where human rights norms are applied. A particular understanding of human rights can, through deliberative processes, thus not only be translated to the empirical plane through the *operation* of human rights law, but also through the *creation* thereof. At first sight this may look like a paradox, however, as this could be taken to mean that human rights that do not yet exist can still be vernacularised through their very creation – a preposition that will not resonate well in particular with legal scholars who rely on the effectuation of codified norms. Consider, for instance, treaty drafting: how could such a drafting process be seen as vernacularizing human rights by using human rights if it is that same drafting process by which human rights are, indeed, drafted? From an entirely legal perspective, such position appears untenable. However, the differences between distinct human rights consciousnesses as well as between dimensions-as-vernacularisation-mechanisms, dimensions-as-tools, and dimensions-as-consciousnesses are crucial in this regard. Thus, vernacularisation through deliberative mechanisms and the use of human rights law as a deliberative instrument do not necessarily require the use of a deliberative consciousness and *vice versa*. Instead, any particular consciousness of human rights – not necessarily being a legal one – can be vernacularised, that is, allocated with prominence in social interaction, by embedding it within legal standards through deliberative processes, and in doing so

190 See e.g. Alfredsson, Grimheden, Ramcharan, & Zayas, 2009; Alston & Crawford, 2000; Keller & Ulfstein, 2012.
191 See e.g. Duffy, 2017, 2018; Prada, 2011.
192 See e.g. Dubinsky, 2004; Silvestri, 2018; Van Schaack, 2003.
193 See e.g. Marceau, 2002.

human rights law may, or may not, be relied upon as an instrument. Deliberation, then, may be a platform and/or an instrument for those seeking to foster the role and significance of a particular human rights conception in regulating social interaction in everyday life, and, importantly, such conception can be completely detached from human rights law in the books *as it currently stands*. The constitutive function, instrumental function, and directional function of each dimension thus can operate in a relatively autonomous fashion, although they are at the same time not inhibited from operating conjointly. In this latter regard, consider, for example, the development – as a result of a reinvigorated belief in justiciable norms – of a new regional treaty based on the provisions and structures of other regional and international treaty regimes: in such case, the deliberative dimension seems to fulfil both a constitutive, a directional, and an instrumental role as human rights understood in a deliberative sense are vernacularised by their insertion into novel regimes through deliberative processes.

At the same time, the instrumental role of human rights as deliberative principles discussed here does not only provide room for the accomplishment of particular human rights consciousnesses, but also for their respective alienation from everyday life. Just as human rights law can be used to vernacularise human rights consciousnesses, it can also be used to minimise and marginalise them. It should in this light be reiterated that, as section 8.5.5. below will deal with in greater detail, the Brahma-like model promulgated here constitutes not a normative framework that merely encapsulates human rights *protection*, but rather an empirical framework that may be utilised to measure both protection – through vernacularisation and instrumentalization – and diminishment – through alienation. This relates back to the 'cat-and-mouse game',[194] or 'rat-race', in particular where the use of human rights law in deliberative processes is concerned: actors can for example decide to *use* human rights law in an attempt to limit their human rights obligations, either pre-codification (through diplomatic means and lobbying efforts at the drafting stage) or post-codification (through litigative argumentation denying responsibility for either certain acts or certain legal norms). In addition, actors can purposively employ strategies of cold-shouldering international human rights obligations and their enforcement.[195] Since various human rights instruments have no noteworthy monitoring mechanism, and since most of the existing monitoring mechanisms generally have no means to bindingly enforce sanctions for norm transgressions, actors can relatively autonomously decide to ignore the implications of monitoring, answerability, and enforcement whilst at the same time relying on the legal frameworks that continue to bind them

194 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3. See also Van Berlo, 2017b, pp. 10–11.
195 See also Hathaway, 2007, p. 593.

in legitimising particular exercises of power.[196] In such instances, power operates under a thin layer of veneer, constituted by codified human rights, that cannot be sufficiently scratched by monitoring bodies in order to command change. The exercise of power therewith continues to derive its alleged legitimacy from this thin layer, with being bound to legal human rights obligations unjustifiably becoming a near synonym for ethical, legitimate, and justified exercise of power. This in turn relates back to what those writing about the looming 'end of human rights' warn for: the ultimate instrumental usurpation of human rights and the resulting transformation of human rights into a legal travesty.[197] The extent to which human rights consciousnesses can ultimately be effectuated and accomplished through the use of human rights law in deliberative processes thus does not necessarily depend on more – or more intense – uses of deliberative mechanisms, nor necessarily on less – or less intense – uses, but rather depends on how deliberative mechanisms are utilised both in fostering, and in limiting, the vernacularisation of varying human rights consciousnesses.

So far, this sub-section has focussed on the instrumental uses of human rights law in deliberative mechanisms such as treaty drafting and legal proceedings. Whilst this makes sense – the directional and the instrumental roles of the human rights dimensions are often closely related – it should be emphasised that human rights as deliberative principles may also fulfil an instrumental role in the vernacularisation mechanisms of the other dimensions. That is to say, also when different routes are being followed, human rights law may prove to be a valuable instrument in achieving change. One could consider, for example, the use of human rights law in circumscribing discretionary decision-making (as a morality mechanism) by means of policy, the use of human rights law in mobilising protest (as a protest mechanism),[198] and the use of human rights law in framing debates (as a discourse mechanism). In turn, like the use of human rights law in deliberative mechanisms, human rights law may in each of these processes also be instrumentally used to alienate human rights consciousnesses. Where states or other actors operate under the thin layer of veneer constituted by human rights law as explained above, human rights law may henceforth potentially also be used to legitimise power and to consequently mute human rights endeavours through discretionary decision-making, human rights-based protest, and human rights claims in public debate. For example, claims that the minimum standards prescribed by international human rights law are attained in any given situation allow actors to impose far-reaching limits on more ambitious endeavours of discre-

196 This includes most prominently states but also private actors in relation to soft law norms that apply to them.

197 Douzinas, 2000; Hopgood, 2013; Posner, 2014c; Wacks, 1994.

198 As Buchanan likewise emphasises in the context of soft law instruments, legal frameworks "may become a focal point for effective political action": A. Buchanan, 2013, p. 25.

tionary decision-making, to silence protest for more extensive rights, and to dominate the public debate not by shunning, but by extensively using, arguments of human rights law.

8.5.4.2 Human rights as natural entitlements

Second, human rights may be relied upon in their quality as natural entitlements. That is to say, any attempt to vernacularise particular human rights consciousnesses through either of the four dimension-specific mechanisms may use human rights as natural entitlements. These processes are, however, often highly obfuscated as reliance on such natural entitlements is hardly tangible: contrary to for example the use of human rights *law,* human rights as natural entitlements largely lack ontological grounding and are therefore difficult to grasp.

Still, whenever they are used for vernacularisation purposes, more often than not their use through either of the four dimensions is unmistakable. First and foremost, any particular set of human rights as natural entitlements – as purported by for example certain philosophical or religious belief systems – may be used in vernacularisation efforts through the moral dimension. Individuals may, in other words, *use* natural entitlements to externally justify their specific use of discretionary decision-making space. In this sense, whereas the constitutive value of the moral dimension of human rights may be used to determine one's decision frame, the instrumental function of the moral dimension can be used to justify – outwards – the application of such decision frame. The same goes, in fact, for each of the other three dimensions: their constitutive value may determine the course of action, whilst their instrumental value may justify reliance on the utilised pathways. Even more so, different combinations may exist in this regard: one's decision frame can, for example, be determined by a human rights consciousness that is largely based in protest understandings of human rights, but can simultaneously be justified by relying on, for instance, the instrumental notion of human rights as natural entitlements.

Likewise, human rights as natural entitlements may be used in vernacularisation endeavours through either of the other three dimensions' mechanisms. Consider, for example, the frequent reliance on moral notions of human rights in the development of international human rights law, both at the drafting stage and in the proceedings of monitoring bodies. In fact, the second fundamental tenet of international human rights law explicated in Part I of this book – that they are, indeed, *human* rights – signals the prime importance of the role of human rights as natural entitlements for the operation of deliberative mechanisms. Likewise, human rights as natural entitlements may be used in vernacularising human rights consciousnesses through protest activities: more often than not, calls for mobilisation and sustained efforts of protest are implicitly or explicitly justified with reference to the importance of the natural

entitlements that arguably pertain to all. Moreover, in discursive vernacularisation mechanisms, human rights as natural entitlements can amongst others be used to steer and frame political and public debates.

Similar to the other dimensions, human rights as natural entitlements may also be used to *alienate* human rights consciousnesses. Specific conceptions of human rights as natural entitlements may, for instance, only include a highly selective catalogue of rights or a specific group of beneficiaries. Relying on such restricted understandings, human rights as natural entitlements may henceforth be used to for example provide human rights law with a restricted interpretation, to discredit protest for more extensive protection, or to curb discourse on human rights.

8.5.4.3 Human rights as protest tools

Third, human rights can be used as protest tools. That is to say, human rights protest – as a *specialis* of protest in general – may be used in either of the four dimension-specific mechanisms in order to achieve vernacularisation goals. Of course, the link with vernacularisation through protest mechanisms is most self-evident: the instrumental value of human rights protest will, on many occasions, indeed be firmly embedded in the context of the employment of repertoires of contention by social movements. In other words, in attempting to vernacularise their human rights consciousness, human rights protest may be used as a particular form of contention within protest mechanisms. Interestingly, human rights protest that is largely based on a protest-inspired consciousness of human rights may be geared *against* human rights understood in a deliberative sense since, as also previously denoted, deliberative notions of human rights may be regarded as 'hijacked' principles that favour the elite and lead to bureaucratization.[199] The use of human rights as protest tools to counter deliberative consciousnesses of human rights may thus ultimately result in what may be denoted as 'fighting fire with fire', although the two components *a priori* seem to have barely anything in common but their name.

In addition, human rights protest can be used to foster the vernacularisation of human rights consciousnesses through the other three dimensions' mechanisms. By relying on protest, individuals for example may enlarge their discretionary decision-making space. Likewise, human rights protest may spur the progressive development of human rights law. It may also notably put human rights (back) on the political and public agenda, therewith creating space for vernacularisation through discursive mechanisms.

At the same time, the same tools can be used for the progressive alienation of human rights. This very much aligns to the alienation strategies that may be employed as part of the instrumental value of human rights as natural

199 Dembour, 2006, p. 254, 2010, pp. 3, 6.

entitlements: where human rights protest is used to focus on a highly selective catalogue of rights or restricted group of beneficiaries, protest starts to revolve around only a sub-set of rights which ultimately may diminish the importance of, and influence the interpretation of, human rights law, may delegitimise divergent discretionary decision-making practices, may compete with concurrent protest activities, and may shift discursive attention from the broader human rights debate to only a sub-set of rights.

8.5.4.4 Human rights as discursive expressions

Fourth, human rights can be instrumentally utilised in their capacity as discursive expressions. As Cassel points out, human rights discourse has attained a prominent position: due to a growing global awareness of human rights, "the language of rights is spoken by diplomatic, governing, policy and academic elites, activist NGOs, the press and, in many countries, sectors of growing middle classes", creating significant scope for discursive conflict and hierarchies.[200]

Thus, on the one hand, human rights discourse can be used to vernacularise particular human rights consciousnesses through the various dimensions' mechanisms. Again, the most obvious connection in this regard is that between the instrumental role of human rights as discursive expressions and the directional role of the discourse dimension. Indeed, in vernacularising human rights consciousnesses through discursive mechanisms, one may expect individuals and collectivities to rely on human rights discourse – although this is not necessarily the case. In some situations, it indeed may be more fruitful to purposively frame the debate in other terms. Human rights as discursive expressions can also be used to vernacularise human rights consciousnesses through other dimensions: little imagination is needed, for instance, to contemplate the importance of human rights discourse for the development of law and for the mobilisation of protest. Human rights discourse may in addition be used in vernacularisation mechanisms that are based on the morality dimension: individuals may, for example, rely on human rights discourse to increase and justify their discretionary decision-making space. In this sense, by framing issues in terms of human rights, vernacularisation through the various mechanisms may effectively be fostered.

On the other hand, human rights discourse can also be used for alienation purposes. As mentioned above, human rights discourse may for instance be used as a tool to alienate human rights consciousnesses through discursive mechanisms, for example by relying on discursive arguments that all human rights criteria have been fulfilled in a given case. In this sense, any substantial lack of rights protection may discursively be erased by relying, precisely, on

200 Cassel, 2004b, p. 3.

human rights discourse. Likewise, specific human rights discourse may be used to counteract the development of law through deliberative mechanisms, for instance by arguing that contemporary human rights law is sufficiently encompassing. It may also be used to mute protest or alternative, concurring discourses that are based on more extensive notions of human rights. In addition, the use of human rights discourses conjoined with other discourses – such as those of risk and penal populism – may be used to alienate human rights consciousnesses through discursive mechanisms.[201] Like the instrumental values of the other three dimensions, human rights as discursive expressions may thus play a role both in the vernacularisation, and in the alienation, of human rights consciousnesses.

8.5.5 A synergistic complexity: dimensional crossovers

The foregoing has shown at various points that there is not necessarily an inseparable link between the dimensions-as-vernacularisation-mechanisms (through which human rights can be accomplished), the dimensions-as-tools (that can be used in such vernacularisation processes), and the dimension-as-consciousnesses (in which human rights are grounded). Rather, *each* of the four consciousnesses of human rights can ultimately be accomplished through *each* of the four vernacularisation mechanisms using *each* of the four tools, although in the latter regard human rights are not necessarily always used as a tool. On the basis of any of the four human rights consciousnesses, one may thus "seek to find methods of practice that can turn those ideas into reality",[202] and these methods of practice can in turn be derived from either of the four dimensions. Relating back to the conceptualisation of human rights as a Brahma, each of the four heads may hence embark on a journey towards vernacularisation of the set of human rights to which it is turned following either of the directions to which its four arms point, and in doing so it may use each of the four ritual objects that Brahma is holding. Dimension-specific consciousnesses, dimension-specific tools, and dimension-specific vernacularisation mechanisms are in this sense detached and do not necessarily operate conjointly within the confines of each dimension. Rather, a plurality of cross-dimensional affiliations can be envisaged. By extension, those pursuing vernacularisation through a particular dimension's mechanisms, or those using a particular dimension's human rights tool, do not need to agree upon the human rights consciousness of that dimension: pursuing the realisation of a human rights consciousness based on one dimension through the vernacularisation mechanisms of another dimension, or by using another dimension's tools,

201 See e.g. Karamalidou, 2017, pp. 189–190.
202 Ife, 2009, p. 212.

is perfectly valid, *even when* in doing so the consciousnesses belonging to the latter dimensions are condemned, minimised, or disapproved of.

From the foregoing, two points become particularly clear. First, that different human rights consciousnesses may be vernacularised through different mechanisms. Second, that in doing so, human rights as instruments may, or may not, play a role. In relation to the former point, protest movements may for example attempt to accomplish human rights as grounded in social struggle not only through protest mechanisms, but also through deliberative processes (e.g. through strategic litigation),[203] discourse (e.g. by changing the dominant discourse or by mobilising the base by putting an issue prominently on the public agenda through public debate),[204] and/or implemented frameworks of morality (e.g. by targeting professionals in the field).[205] Over the past decades, various studies have focused on the vernacularisation of *protest* through *deliberative* processes specifically, albeit often in the US context and usually not specifically in relation to human rights consciousness. Such research describes amongst others how "social movements [may] demand particular changes in the law or legal system […] [and] may invoke international law or direct their grievances at international institutions".[206] In fact, the four categories of legal consciousness explained above – with actors operating *before, with, against,* or *under* the law – have specifically been developed in the context of social movement action.[207] As Fritsvold's research shows, social movements can rely on various of these categories in their (non-)use of deliberative processes to foster protest goals.[208] Another example is the work of McCann, who points to the importance of litigation for pay equity movements in the US in the 1970s and 1980s.[209] As he finds, even though social movement litigation often fails to produce public policy changes of a large-scale or top-down nature, litigation is still crucial for the empowerment of individuals and for the reformation of their social relationships and identities.[210] Even though law may represent privileged power and structural inequalities, it can, according to McCann, at the same time be a foundation for empowerment, entitlement, and inclusion since it provides a basis for couching the needs of the underprivileged and consequently creates opportunities for collective

203 See also Hilson, 2002, who suggests that there is a need to study social movements' strategies such as lobbying, litigation and protest in conjunction.

204 Lindekilde, 2014, pp. 198–202. Whitty has labelled these abilities as 'legal risk+', as human rights protest in this sense has the capacity "to propel an issue to centre stage, damaging an organisation's operation and reputation, irrespective of actual legal liability": see Whitty, 2011, p. 124.

205 Chiarello, 2013, p. 429.

206 G. Martin, 2015, p. 244.

207 Fritsvold, 2009.

208 Fritsvold, 2009.

209 McCann, 1994.

210 McCann, 1994, p. 291.

action.[211] Thus, "[p]eople at the 'bottom' are used to seeing law in two ways at once. From an 'outsider' perspective, they view law critically as an unprincipled source of privileged power. From an 'insider' perspective, they adopt an 'aspirational' view of law as a potential source of entitlement, inclusion, and empowerment".[212] Others, however, are less optimistic when it comes to the potential of deliberative processes for reform based on social struggle: Rosenberg, for example, develops the thesis that US courts have essentially not been engines of social change.[213] Most change has, as he argues, been brought about not through judicial intervention but through political efforts instead.[214] From this perspective, vernacularisation of protest consciousnesses is deemed less successful through deliberative mechanisms than it is through protest mechanisms operating within the proper domain of politics where, indeed, actual *change* can be achieved in the *body politic*. The work of others, in turn, nuances this point: Scheingold, for example, admits that courts are very restricted in effecting social change directly, yet simultaneously points out that they may nevertheless function as a catalyst for social change by placing social issues prominently on the public agenda.[215] This, then, points to the potential use of multiple vernacularisation mechanisms in order to effectively vernacularise a certain human rights consciousness: deliberative processes may table social issues, through a powerful discourse of 'rights', on the public agenda, which in turn may spur protest efforts at the conventional political plane or, alternatively, at the level of deontological movements operating outside of the political arena.[216] Duffy, discussing the role of strategic human rights litigation in her inaugural lecture, points out in this regard that

> "Change happens gradually and cumulatively, often not from an isolated case but from a series of cases, in conjunction with other processes. Whether litigation meets its potential to influence legal, social, cultural change for example, may depend less on what courts say and do, or what people say and do *in* court, than on the work of a much broader range of actors – civil society, media, legislatures. Years of civil society engagement often precedes, and lays the groundwork, for litigation. In turn, it is only through the follow-up of multiple actors that what happens in the dark room of the court can be projected back out, seen, heard and felt, in the real world."[217]

211 McCann, 1994, p. 233. See also McCann, 1998.
212 McCann, 1994, p. 233.
213 G.N. Rosenberg, 1991. For a critique of Rosenberg's work, see particularly Feeley, 1992.
214 G.N. Rosenberg, 1991.
215 Scheingold, 1974.
216 See also Feeley, 1992, pp. 751–752.
217 Duffy, 2017, p. 13.

The idea that a particular consciousness may be vernacularised through all four dimensions also applies to human rights consciousnesses that are based on other dimensions than the protest one. Thus, for instance, human rights as deliberative principles may not only be accomplished through the operation of the legal system, but also through protest (e.g. lawyers or monitoring bodies becoming involved in public action, rallies, demonstrations), discourse (e.g. lawyers or monitoring bodies speaking out in the public debate), or the implementation of morality frameworks (e.g. training in legal norms for professionals in the field). Moral conceptions of human rights as grounded in justice and fairness may, similarly, be accomplished not only through mechanisms based in morality, but also through deliberative processes (e.g. by lobbying for the codification or amendment of legal norms based on moral frameworks and argumentation),[218] protest (e.g. church groups becoming involved in social action), or discourse (e.g. religious leaders speaking out in their congregations or in the broader public debate, or the 'naming and shaming' of governments or corporations on the basis of their alleged violations of moral norms).[219] Discourse conceptions of human rights, finally, may be accomplished not only through discursive practices, but also through protest (e.g. by organising rallies or demonstrations centred around human rights notions that featured prominently in recent public debate, such as children's rights), implemented frameworks of morality (e.g. by calling upon professionals in the field to not act against the spirit of particular human rights notions that featured prominently in recent public debate), or deliberative processes (e.g. by codifying or amending human rights law on the basis of human rights notions that dominated political or public debates).

In turn, in each of these processes, those seeking vernacularisation may, or may not, rely on the instrumental role of each human rights dimension. Thus, each dimension makes distinct human rights instruments available for potential usage: human rights law, human rights as natural entitlements, human rights protest, and human rights discourse. Whether or not these instruments are used – or, alternatively, whether other instruments are used, such as different fields of law, different moral conceptions, different forms of protest, or different discourses – depends on the individuals involved, the pervasiveness of the various human rights dimensions, and the context at hand. Such three-layered role of the Brahma conceptualisation of human rights is schematically depicted in Figure 11, which sketches the multitude of potential interactions between human rights consciousnesses, vernacularisation mechanisms, and instruments.

218 It is sometimes even argued that the International Bill of Rights signified the "emergence of morality in international law": Perry, 2005, p. 32.

219 See, in relation to 'naming and shaming' techniques and the recourse to human rights in discourse, Scheper, 2015.

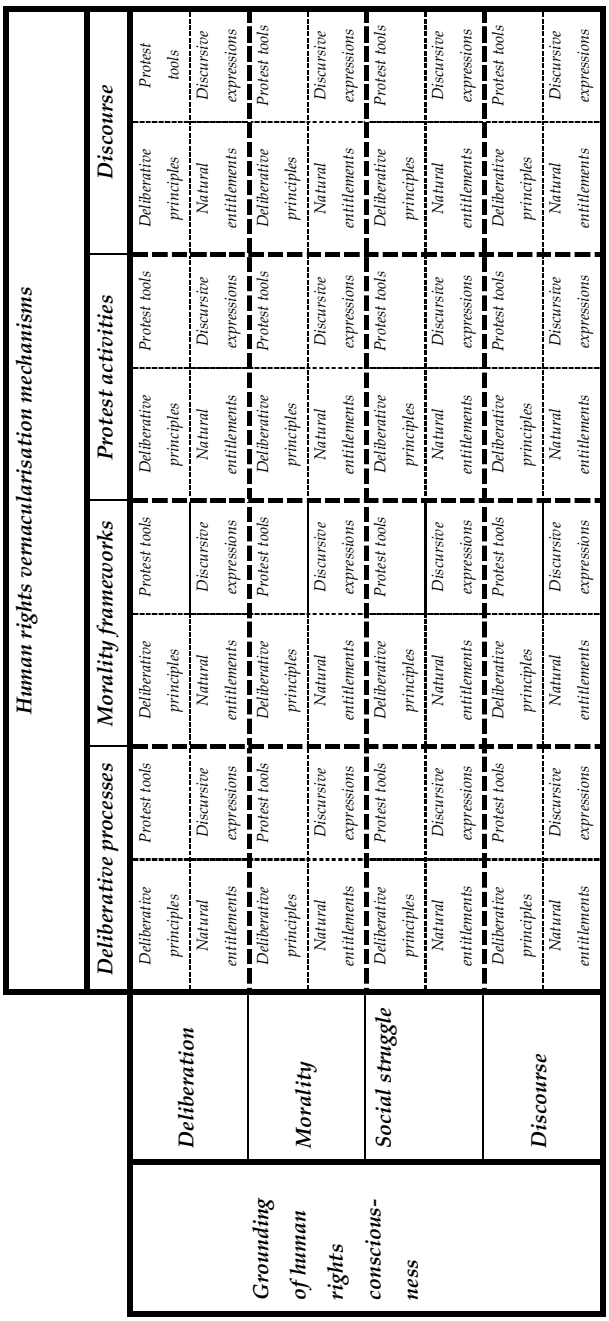

Figure 11: Holistic grid of human rights realisation showing human rights consciousnesses and human rights vernacularisation mechanisms (on both axes) and human rights tools.

Each of the 16 squares in Figure 11 divided by a bold dashed line thus depicts a unique pathway for the vernacularisation of a particular consciousness of human rights, although in practice there will often be a certain overlap and fluidity given that (i) individuals and collectivities will frequently have unique human rights consciousnesses that draw upon various of the four distinct human rights consciousnesses identified above, and (ii) they will frequently attempt to vernacularise their human rights consciousness by using different mechanisms simultaneously. Both points have been illustrated above extensively. To represent such fluidities, Figure 11 separates the sixteen possibilities with a *dashed* line. In addition, each of these squares is further divided into four smaller squares, pointing out that in the context of each of these distinct pathways human rights may be instrumentally used in either of four ways. Again, the four sub-squares in each larger square are divided by a dashed line, which likewise indicates that individuals may rely on the instrumental value of multiple human rights dimensions simultaneously. At the same time, each instrumental value remains facultative: those seeking vernacularisation may, depending on the circumstances, opt to *not* use human rights as instruments at all as outlined above.

Ultimately, in analysing the role and value of human rights as a protection mechanism, looking at the three layers of all four dimensions simultaneously is warranted. Any holistic assessment should furthermore take into account not only the *delineation* of different dimensions, but also immediately the *relativity* of such delineations. That is to say, the existence of distinct dimensions should simultaneously be acknowledged and epistemologically questioned. This may result in an analysis of what may be labelled the 'synergy' of human rights. Such synergy consists of the interaction and cooperation between different human rights dimensions to produce a combined effect that is greater than the sum of their separate effects. The proposed approach henceforth allows for the assessment of human rights' durability to transcend the insulated appraisal of the various separated dimensions, by approaching *each* of these dimensions from a holistic human rights perspective and by nuancing the analyses of each of these dimensions by regarding them, in light of one another, as autonomous yet co-dependent entities.[220] Somewhat paradoxically, the holistic study of human rights requires one to first place the different dimensions of human rights in stark contrast with one another – along the lines of the examination above – and to subsequently place such sharp distinctions into perspective by regarding the way in which the dimensions operate synergistically.

The proposed approach consequently offers an analytical grid – as illustrated by Figure 11 – that does not only provide insight into, but may also foster, the mutual understanding, close cooperation, and continuous debate

220 See also Breakey, 2018, p. 19, who describes these processes as 'cross-pollination'.

between different strands of human rights thinking and theorizing. Whereas authors belonging to different schools of human rights have frequently claimed that "the alternatives are mistaken, divisive, irrelevant, unreal or unhelpful" and should consequently be rejected,[221] in reality the various human rights schools indeed seem to be complementary, mutually informing, and compatible in a more holistic perspective on human rights. In principle, the schools thus can accord with one another: "[n]one of the grounds proves so strong that, once accepted, it must colonize the moral landscape, and obviate the others' significance".[222] As Dembour and Kelly likewise emphasise, we should understand that

> "human rights not only are made, but also *must* be made of different aspects. […] [O]ne approach, one way of fighting for human rights, will never be sufficient. To realise human rights, the concerns of all four schools need to be properly addressed. […] If the concerns of one school are neglected, then something of crucial importance will be missing".[223]

Adherents of different schools are therewith called upon to agree to disagree but to nevertheless deploy their respective perspectives in an attempt to holistically establish the durability of human rights in specific situations, including in instances of confinement. This is even more important given that, as outlined above, different consciousnesses of human rights can be achieved through the vernacularisation mechanisms and instrumental values of each of the four dimensions. Even where scholars maintain different perceptions of what human rights *are*, they can and arguably should thus still collaborate to examine how each conception of human rights can be best accomplished through the variety of mechanisms and instruments available.

As a consequence, the approach proposed here concerns both ontological and epistemological aspects of human rights protection: it does not only conceptually connect the different ontological appearances of human right s, but also provides a basis to epistemologically examine them in order to uncover their true nature and, importantly, their value (or lack thereof) as (part of) a protection mechanism in specific contexts. This, in turn, makes clear that the framework postulated here does not normatively regard either of the four human rights dimensions as 'right' or 'the best'. In line with the approach taken by amongst others Koskenniemi, the purpose here is thus not to normatively *claim*.[224] Rather, the framework embraces that the human rights notion is pluralist in nature and may manifest itself simultaneously in different forms, and furthermore that the various human rights dimensions may be mutually

221 Breakey, 2018, p. 12.
222 Breakey, 2018, pp. 16–17.
223 Dembour & Kelly, 2011, pp. 21–22.
224 Koskenniemi, 2011, p. 134.

informing and strengthening. Moreover, by studying both human rights consciousness *and* human rights alienation, it recognises that people may (choose to) not use human rights in one or more of its particular capacities *at all* in their daily life. The normative value of each dimension is, therefore, never *prima facie* given. Instead, one can only begin to answer the question as to the normative superiority of either of the four dimensions – either as a breeding ground for consciousness, as a context for vernacularisation, or as an instrumental toolbox – when the empirical context is taken into account, and as a consequence any answer in this regard is conditionalized by such empirical specificities and cannot be abstracted into a general rule of normative preference.

Constituting an alternative answer to the human rights impasse, this approach ultimately prevents both human rights' premature nullification – through warnings or even calls for the alleged 'end' of human rights – and their ongoing hyperbolic glorification – through functionalist and expansionist approaches. Contexts of confinement perfectly illustrate this point. Deliberative scholars considered purist in their approach, in particular those with a positivist doctrinal inclination, believe that human rights law established through appropriate deliberative channels is all there is in terms of human rights and may accordingly have a difficult time to reconcile effective human rights protection in confinement with globalisation developments. Indeed, as Part II has shown and as the next chapter will further illustrate, international human rights law has in relation to specific instances of commodification and crimmigration simply been unable to fulfil its protective role in full. In other words, in such contexts, its *instrumental* value – and, to a certain extent, its *directional* potential – is significantly challenged. However, this by no means signifies that human rights are by definition losing their significance or meaning in such confinement settings as human rights do not – and this cannot be stressed enough – necessarily *need* to be, nor *should* be, understood as mere deliberative principles. In fact, those identifying as quintessential human rights orthodox believers, ascetics/evangelicals, or nihilists would strongly disagree with such an exclusive classification. For these schools of thought, arguments that human rights require novel interpretations or are to a certain extent outdated in contemporary globalised realities do not make sense. Typical orthodox believers would respond that human rights exist independent of contemporary reality and cannot possibly be outdated by it, ascetics/evangelicals would argue that human rights have never been more crucial and should be fought for more than ever before, and nihilists would suggest that human rights are futile devices anyway in the sense that they primarily carry value in the eye of the beholder. The argument that human rights are out-dated may thus be convincing from a deliberative perspective in a positivist doctrinal sense but is incomplete insofar as it fundamentally neglects the other dimensions of human rights. Furthermore, where such deliberative scholars have a difficult time to reconcile effective human rights protection with globalisation develop-

ments, they may fail to appreciate not only that human rights have multiple simultaneous manifestations, but also that human rights can be accomplished through multiple mechanisms simultaneously *and* offer a diverse toolbox that extends beyond the instrumental value of the deliberative dimension. Vernacularisation of human rights consciousnesses that are heavily influenced by deliberative notions may thus still take place through each of the four dimensions – *including*, indeed, the deliberative dimension, as alternative deliberative mechanisms such as criminal or tort law at times provide alternative grounds to vernacularise human rights other than through international human rights law itself – and in doing so the human rights tools provided by other dimensions could be, but do not necessarily need to be, relied upon.

8.5.6 From conceptual synergy to methodology: a few notes

Finally, this section will touch upon the way in which vernacularisation through each dimension can be scrutinised. The focus is thus *not* on the four human rights consciousnesses, nor on the dimensions' instrumental values, but on the way in which the four vernacularisation mechanisms can be methodologically approached. Although the framework is proposed in the context of confinement and thus will focus on the way in which each dimension's vernacularisation process may operate in confinement settings, the four-dimensional model can also be utilised to holistically assess human rights consciousness and alienation in other specific contexts, although this will – depending on the concrete alternative setting at hand – require specific modifications to the way in which these dimensions are methodologically approached.

From the start, it should be stressed that there is not *one* definite holistic methodological framework within which all complexities of the human rights synergy can be encapsulated for all research into the meaning and role of human rights in contexts of confinement. Whilst a myriad of methods can be applied to understand such meaning and role, the choice for certain methods will ultimately depend on a variety of factors.

Thus, first, the four-dimensional human rights framework allows for various strands of research based on varying aims and pursuing different research questions. In turn, the specific question asked in a given research project will largely determine the methodological framework to be applied. Some research projects may be geared towards uncovering the protection of human rights flowing from one particular human rights consciousness. Others may be geared towards analysing the way in which a particular vernacularisation mechanism is utilised to accomplish varying goals. Yet others may look specifically into a particular instrumental use of human rights. Alternative research projects may be aimed at analytically indicating the role of a particular actor or collectivity in pursuing specific human rights goals. Still others may, intrepidly and comprehensively, pursue to indicate the overall role and rel-

evance of human rights in a particular context by tapping into each of the combinations of consciousness and vernacularisation outlined above. Given the distinct nature of each of these potential projects, they will all rely on different methods and techniques in pursuing the research questions that they centralise.

Furthermore, context-specific factors are highly relevant for the choice of methodology. In some contexts, certain vernacularisation mechanisms will for example be much more prominent than others. For instance, in some contexts judicial oversight may be strong, in others it may be weak or even non-existent; in some contexts significant room for discretionary decision-making may exist, in others it may not; in some contexts a significant presence of social movements may be denoted, in others such movements may be weak or absent; in some contexts human rights discourse may feature prominent, in others it may be largely inexistent. Such particularities may to certain extents dictate a project's methodological focus. Additionally, the specifics of a given case study can also warrant the use of *additional* methods that are tied not to a specific dimension but rather to the type of case study concerned. In contexts of commodified confinement, it could for example be warranted to combine the various methods of the individual dimensions with an overarching analysis of the nodal network – such as that purported in chapter 2 – in order to identify, for instance, relevant actors to focus upon.[225]

Methodological choices may moreover be curbed by practical limitations. For example, the choice of methods depends on whether or not access to particular research sites or to relevant actors can be secured. More generally, the overall availability of data significantly conditionalizes the methodological framework. Such practical limitations generally apply more in relation to some dimensions than they do in relation to others: access to discourse or legal documents can, for example, on many occasions be more easily secured than access to, for instance, sites of confinement, professionals, or specific protest movements, which all depend on external approval.

For these reasons, there is no exhaustive or required selection of methods nor a set ratio of qualitative, qualitative, and/or dogmatic components that ought to be pursued as a matter of principle. It consequently does not make sense to postulate a purportedly comprehensive research framework that would, when applied, provide an exhaustive basis for conclusions as to the meaning and role of human rights in a particular context. Such 'methodological utopia' should not, and cannot, be promised. Instead, the subsections below will provide a few notes that should be taken into account whenever a research project attempts to analyse vernacularisation through either of the four dimensions' mechanisms in contexts of confinement.

225 See also Caiani, 2014.

8.5.6.1 Assessing deliberative processes

First, to examine vernacularisation of human rights through the deliberative dimension, legal analysis may focus on international human rights law or on related legal fields such as criminal or tort law. Whenever the focus is on international human rights law – examining the instrumental use of human rights as deliberative principles through deliberative vernacularisation mechanisms – analysis should include both human rights law *in the books* – setting *de jure* standards of responsibility – and human rights law *in action* – leading to *de facto* legal accountability – is needed. Analysis should ideally focus on the way in which human rights consciousnesses can be produced and reproduced through deliberative processes, ranging from the drafting stage to the stage of judicial enforcement. This thus includes processes of responsibilisation (in the books) as well as of answerability and enforcement (in action).

To perform such dimension-specific analysis, research should henceforth study the division of responsibility in 'black-letter law' in comparison with actual levels of accountability in practice, *inter alia* by elaborating upon factors that either hamper of induce actors to be held accountable for their human rights obligations. This, ultimately, will show the true vernacularisation potential of deliberative processes. One therefore needs to resort not only to legal research – including in-depth analysis of jurisprudential trends – but also to socio-legal research inquiring into the *de facto* accountability implications of human rights responsibilities.

8.5.6.2 Assessing frameworks of morality

The vernacularisation of human rights through morality frameworks is arguably somewhat difficult to assess as it concerns processes that for an important part take place within an individual's psyche, that is, insofar as the meaning assigned to internalised human rights consciousnesses for decision-making purposes is concerned. That does not mean, however, that vernacularisation through morality frameworks cannot be assessed. To the contrary, discretionary decision-making can be empirically scrutinised, which in turn also – at least by proxy – indicates underlying processes of norm internalisation and norm socialisation. In contexts of confinement, generally, this requires analysis of the extent to which discretionary decision-making space is substantiated with particular human rights conceptions. Research should hence typically focus on each relevant level of discretionary decision-making, that is, on the 'social surround', the 'decision field', and the 'decision frame'. In addition to desk research, this requires – in particular in relation to the 'decision frame' – the application of empirical research methods in order to unveil the moral blueprints that guide discretionary decision-making in specific case studies. Qualitative interviews are generally suitable in this regard, which could be supple-

mented by observations, surveys, and focus groups where possible and appropriate.

8.5.6.3 Assessing protest activities

As outlined above, social movements can broadly be divided into two categories: those taking place within the confines of the traditional political arena and those operating outside of it. Methodologically, any full-scale inquiry into the role of the protest dimension in vernacularising human rights should take both traditions into account. Thus, whenever research attempts to deal exhaustively with vernacularisation through this dimension, analysis should include the extent to which social movements are able to command change either within or outside of the conventional political realm.

Such research should always be firmly embedded in the respective contexts in which it takes place.[226] Core potential methods in this regard are in-depth interviewing, participant observations, focus groups, surveying, frame and discourse analysis,[227] and document analysis.[228] Staggenborg emphasises that such qualitative methods are particularly helpful for social movement research, given that the experiences, perceptions, and emotions of the researchers involved can be important sources of data.[229] Thus, "[b]oth participant-observation and in-depth interviews produce interactional and observational data that are critical to understanding social movement dynamics".[230] Also, through such rich qualitative data gathering techniques and thick analysis, the "illusion of homogeneity" of social movements can effectively be broken down.[231] Concrete research designs implementing such an approach may, moreover, do so in accordance with grounded theory, which is very

226 Caren, 2013, p. 364.

227 Frame analysis and discourse analysis are closely related in that they are both "preoccupied with how ideas, culture, and ideology are used, interpreted, and spliced together with certain situations or phenomena in order to construct particular ideative patterns through which the world is understood by audiences": Lindekilde, 2014, p. 199. However, they differ in the sense that frame analysis in the context of social movements focuses on the question how ideas or ideologies are deliberately utilised to "mobilize supporters and demobilize adversaries" in relation to a specific goal, whereas discourse analysis looks at the question how text at various stages bring an object into being and how it gives a particular meaning to such object. Discourse analysis is thus focused on uncovering social construction of reality, whereas frame analysis aims at explaining the impact of framing exercises on mobilisation and participation: see Lindekilde, 2014, pp. 200–201.

228 Staggenborg, 1998, p. 353. See also Andretta & Della Porta, 2014; Balsiger & Lambelet, 2014; Della Porta, 2014b, 2014a; Lindekilde, 2014.

229 Staggenborg, 1998, p. 353. See also Balsiger & Lambelet, 2014, p. 151. At the same time, such research may involve large amounts of 'emotional labour' which could be experienced by researchers as a type of "violence to the self": see Creek, 2012.

230 Staggenborg, 1998, p. 355.

231 Balsiger & Lambelet, 2014, p. 148.

suited to deal with questions of *how* social movements may bring about change in human rights realities.[232]

Triangulation of different methods is widely vaunted and practiced in social movement research, which seems not so much to be the result of a conscious 'methodological war' but rather of a natural epistemological favouring of pragmatism under the banner of what has been labelled the "absence of methodological dogmatism".[233] Social movement research should thus, as Della Porta explains, be regarded as incorporating a primarily pluralist attitude.[234] This does not only suit the overall problem-oriented (rather than method-oriented) approach of social movement studies, but also aligns with the fact that social movement research often encounters a relative lack of reliable and accessible databases, which in turn compels the importation and adaptation of research methods from other fields and the invention of new methods altogether.[235] Through triangulation one can furthermore overcome biases and limitations inherent in studies employing a single method or data source.[236]

8.5.6.4 Assessing discourse

To analyse human rights vernacularisation through discourse mechanisms, discourse analysis should be introduced as an appropriate domain of study in the context of human rights. Discourse analysis at its core attempts to uncover the meaning of text, not by looking at particular texts in isolation but rather by connecting the plain and ordinary meaning of words at textual level to the way in which text production, dissemination, and reception have a shaping influence on the meaning of such texts.[237] Language is therewith understood as a social practice.[238] Whilst various types of discourse analysis have been developed, a particularly influential one – and one that is of specific relevance for the type of inquiry pursued here – is *critical* discourse analysis

232 Mattoni, 2014, p. 38.
233 Della Porta, 2014c, p. 2; Klandermans & Staggenborg, 2002, p. xii. See also Ayoub, Wallace, & Zepeda-Millán, 2014.
234 Della Porta, 2014c, pp. 1–4.
235 Della Porta, 2014c, pp. 2–3.
236 Ayoub et al., 2014, pp. 67–68. The holistic study of human rights proposed in this chapter – taking into account each of the four dimensions involved as well as their crossovers – *in itself* also constitutes triangulation of sorts given that it uses multiple research methods and data sources in order to construe a holistic picture of human rights as a complex phenomenon. Still, it can be important to apply triangulation in relation to one or more of the particular dimensions at hand in order to provide for a more holistic account *of that particular dimension*.
237 Lindekilde, 2014, p. 198.
238 Davis, 2015, p. 280.

('CDA') as developed by Fairclough.[239] Given that CDA focuses on the way in which inequality and power relationships are embedded in discursive practices, it provides an appropriate framework of analysis to examine how language, human rights ideology, and material human rights protection interrelate.[240] One of the most striking features of CDA is, in fact, that it is concerned primarily with responsibility and is endowed with a commitment to social justice – it is, as some have argued, "linguistics with a conscience and a cause".[241] CDA accordingly attempts not only to uncover the meaning of texts, but also the way in which they express and foster particular ideological perspectives "delicately and covertly".[242] CDA therewith is particularly useful in analysing the vernacularisation of particular human rights consciousnesses through discourse.

Concretely, Fairclough has set out a three-dimensional analytical model to perform CDA in any given setting.[243] In essence, these three dimensions of CDA reflect different *levels* of analysis: the micro, the meso, and the macro level. Thus, any CDA should include "(i) an examination of a text's linguistic features (the 'level of the text', or micro level), (ii) an exploration of processes related to the text's production and consumption (the 'level of the discursive practice', or meso level), and (iii) consideration of the text's wider cultural and social context, of which the text is a 'communicative event' (the 'level of the sociocultural practice', or macro level)".[244]

Under the banner of CDA, the object of analysis is hence not mere plain text, but social interaction through discourse.[245] As I outlined elsewhere, the (micro) level of the text and the (macro) level of the sociocultural practice are essentially bi-directional and operate through the (meso) level of the discursive practice: "the way language is used is not only shaped and influenced by the socio-cultural framework in which it is positioned, but this socio-cultural framework is simultaneously shaped and influenced by the way language is used. Text and context thus continuously model each other."[246] In other words, whilst text is produced in accordance with socially embedded discourses, the social context is simultaneously reproduced and/or challenged by text through its distribution and consumption in what may be labelled a circular process. In the context of human rights vernacularisation through

239 Chouliaraki & Fairclough, 1999; Fairclough, 1993, 2003, 2013b, 2013a. This type of discourse analysis has in fact been applied by scholars from a wide variety of disciplines other than that of linguistics, including in the fields of law, criminal justice, political science, health science, and even archaeology: see e.g. Macquoy, 2015, p. 18.

240 Campos Pinto, 2011; Van Berlo, 2015a, p. 82.

241 Widdowson, 1998, p. 136.

242 Batstone, 1995, pp. 198–199; Van Berlo, 2015a, p. 82.

243 Fairclough, 1993, 2013b, 2013a; Van Berlo, 2015a, p. 83.

244 Van Berlo, 2015a, p. 83.

245 Fairclough, 2013b; Van Berlo, 2015a, p. 83; Wodak & Meyer, 2009.

246 Van Berlo, 2015a, p. 83. See also Lindekilde, 2014, p. 204.

discourse mechanisms, CDA is thus ideally placed to reveal the extent to which, through the effective use of discursive practices, language is not only shaped by the macro-level social context but also *alters* such context by either inducing or reducing compliance with particular human rights consciousnesses. Where multiple discourses exist, CDA is able to analyse which of these discourses is 'dominant' or 'hegemonic' in shaping sociocultural practice at a particular point in time and therewith is of compelling value.[247]

8.6 Conclusion

The holistic reconceptualisation of human rights developed above gives cause for optimism in relation to the 'bleak picture' painted at the beginning of this chapter. Rather than a Janus-faced phenomenon, human rights should be regarded as a Brahma, both in terms of how human rights can be *conceived of*, in terms of how they can be *achieved*, and in terms of how they can be *utilised*. By drawing on notions of human rights pluralism, consciousness, and vernacularisation, this chapter has shown that human rights can be based on respectively deliberation, morality, social struggle, and discourse, that they can potentially be achieved through mechanisms of respectively deliberation, morality, social struggle, and discourse, and that they may be instrumentally used as deliberative principles, natural entitlements, protest tools, and discursive expressions. In this sense, the 'human rights elephant' may use one or more of these 'desire paths' to arrive at its destination of effective protection. Even more so, people's human rights consciousnesses will on many occasions be highly unique given that they can be grounded in one or more dimensions simultaneously. Human rights vernacularisation mechanisms also operate in a rather unique fashion, given that their effectiveness in translating human rights consciousnesses into actual protection ultimately depends on the specifics of any context in which such effectuation is sought. In these processes, human rights may, or may not, be used as instruments in accordance with the specificities of the context at hand.

The various dimensions can, in particular as contexts for vernacularisation and as instrumental tools, thus not be assigned with moral status in the abstract: the effect that they have on the empirical world, or the 'good' or 'bad' that they do, is always conditionalized by contextual factors. This is all the more so given that each of the vernacularisation mechanisms and instruments may, based on the concept of alienation, also be used to *alienate* certain human rights understandings: ultimately, processes of deliberation, morality, social struggle, and discourse may thus not only *foster* the vernacularisation of particular human rights consciousnesses but may also do the exact opposite.

247 See also Lindekilde, 2014, p. 206 and Cassel, 2004b, p. 3.

The same applies to the instrumental use of deliberative principles, natural entitlements, protest tools, and discursive expressions: from the perspective of human rights protection, they may be employed for the better but may also be employed to the detriment of such protection. Ultimately, we should therefore acknowledge the need to further develop sociological accounts of human rights,[248] as it is the social rooting of human rights that is key to all of these processes. In this light, the importance of understanding that the framework presented in this chapter is *empirical,* not normative, in nature cannot be overstated: what is envisaged is not to show how human rights protection would increase on the basis of the promulgated approach, but rather to show the real (positive and negative) impact of human rights promises and practices in a particular setting. Put differently, the presented framework does not *direct* human rights implementation but rather *tracks* it on the basis of a multidimensional and interdisciplinary approach.

Research on the holistic value of human rights as a protection framework henceforth ideally has to take into account the consciousnesses, tools, and vernacularisation mechanisms flowing from each of the four dimensions of the human rights notion. As pointed out above, the different dimensions are complementary, mutually informing, and compatible and therefore *should* indeed be addressed in light of one another.[249] Each of the perspectives provided by the various dimensions is useful, and each helps us in understanding what human rights *are*, in their constitutive, directional, and instrumental capacities, yet each of the perspectives also has its blind spots. It is, therefore, required not to focus solely on one dimension, as to do so would entail that the strengths and weaknesses of the various dimensions would not be able to complement and correct one another.[250] Of course, whilst much research is delimited in accordance with practical and conventional constraints, at a minimum it should continuously acknowledge the existence and relevance of concurring human rights dimensions, even where such paradigms remain outside the scope of a particular study. Holistic human rights analysis, then, requires one to embrace that human rights are, essentially, cohesive in diversity, and that they provide a wide variety of desire paths that may, or may not, lead to effective protection, or that may decrease protection, depending on the contextual particularities at hand.

248 See also Clément, 2015; Frezzo, 2015.

249 See also Breakey, 2018, pp. 16–17; Dembour & Kelly, 2011, pp. 21–22.

250 Van der Burg made a similar argument in the context of various dimensions or models of 'culture': Van der Burg, 2008, p. 13.