

NUEVO REALISMO JURÍDICO:
UNA TEORÍA JURÍDICA PROMETEDORA
PARA LA INVESTIGACIÓN
INTERDISCIPLINARIA Y EMPÍRICA
SOBRE EL DERECHO EN LA PRÁCTICA

Adriana Caballero Pérez



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Resumen

El Nuevo Realismo Jurídico (NRJ) es una perspectiva teórica que promueve una relación colaborativa entre el derecho y las ciencias sociales. Esta teoría amplía el horizonte de los estudios legales al situar las problemáticas jurídicas en sus contextos sociales más amplios y asegurar un estudio científico del derecho. Este artículo reflexiona sobre la utilidad de adoptar el NRJ en los estudios legales sobre la implementación del derecho y, especialmente, el derecho internacional. A partir de una revisión de literatura, se discuten cuatro características del NRJ: carácter centrado en las normas jurídicas; promoción de la investigación interdisciplinaria; promoción de la investigación empírica; y promoción de la investigación activa y crítica en el derecho. Este artículo concluye que adoptar la perspectiva del NRJ en los estudios sobre la implementación del derecho internacional es importante para analizar no solo su implementación mediante textos legales o de política, sino también por medio de prácticas sociales. Esto requiere analizar el contexto social más amplio en el que el derecho opera, es decir, el “derecho en la práctica”. El propósito final de este artículo es invitar a la acción colaborativa entre investigadores de las áreas jurídicas y sociales. Dicha acción implica para los juristas investigadores, el reto de incorporar teorías novedosas como el NRJ en sus estudios, a fin de adelantar un análisis normativo que tome en cuenta perspectivas más amplias y holísticas sobre el derecho. Finalmente, y dado el actual campo de investigación de la autora, se incluye una breve reflexión sobre la utilidad de adoptar el NRJ en los estudios sobre la implementación de la Convención sobre los Derechos de las Personas con Discapacidad (CDPD). Esta es un área de investigación por explorar.

Palabras clave: Nuevo Realismo Jurídico; estudios jurídicos; implementación del derecho.

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NEW LEGAL REALISM: A PROMISING LEGAL THEORY FOR INTERDISCIPLINARY AND EMPIRICAL RESEARCH ABOUT THE 'LAW-IN-ACTION'

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Abstract

New Legal Realism (NLR) is a relevant theoretical strand advancing a constructive relationship between law and the social sciences. NLR broadens the 'scene' in legal studies by placing legal issues in their broader social contexts and follows the aspiration of the scientific study of law. Based on the literature review, this article presents a brief discussion on NLR. It argues that an NLR approach might be useful for carrying out research on compliance with (international) law in practice, i.e., the 'law-in-action'. This article finds that four main characteristics of NLR, mainly its law-centred, interdisciplinary, empirical, and constructive legal action character yields useful results to analyse States' compliance with the law. It concludes that an NLR approach contributes to moving from exploring law in books to investigate 'law-in-action'. This involves analysing compliance with the (international) law through domestic law and policy instruments, as well as compliance through social practices. This means to explore the social context within which the law operates. In other words, to investigate the impact of the law at the point of delivery (or the 'law-in-action'). The underlying purpose of this article is thus to call for collaborative action among legal and social scientific researchers by considering to adopt novel theories, such as NLR, to mix normative legal analysis with consideration of broader and holistic perspectives on the law. Lastly, due to the current research interests of the author, this article includes a brief reflection on adopting an NLR approach to analyse State Parties' compliance with the UN Convention on the Rights of Persons with Disabilities (UN CRPD). Notably, in the available literature, this is an underexplored issue.

Key words: New Legal Realism; legal studies; compliance with the law.

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NOVO REALISMO JURÍDICO: UMA TEORIA JURÍDICA PROMISSORA PARA A PESQUISA INTERDISCIPLINAR E EMPÍRICA SOBRE O DIREITO NA PRÁTICA

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Resumo

O novo realismo jurídico (NRJ) é uma perspectiva teórica que promove uma relação colaborativa entre o direito e as ciências sociais. Essa teoria amplia o horizonte dos estudos legais ao situar as problemáticas jurídicas em seus contextos sociais mais amplos e garante um estudo científico do direito. Neste artigo, reflete-se sobre a utilidade de adotar o NRJ nos estudos legais sobre a implementação do direito e, em especial, do direito internacional. A partir de uma revisão da literatura, são discutidas quatro características do NRJ: caráter centralizado nas normas jurídicas, promoção da pesquisa interdisciplinar, promoção da pesquisa empírica e promoção da pesquisa ativa e crítica no direito. Conclui-se que adotar a perspectiva do NRJ nos estudos sobre a implementação do direito internacional é importante para analisar não somente sua implementação por meio de textos legais ou de política, mas também, mediante práticas sociais. Isso requer analisar o contexto social mais amplo no que o direito opera, isto é, o “direito na prática”. O objetivo deste artigo é fazer um chamamento à ação colaborativa entre pesquisadores das áreas jurídicas e sociais. Essa ação implica para os juristas pesquisadores o desafio de incorporar teorias novas como o NRJ em seus estudos a fim de realizarem uma análise normativa que considere perspectivas mais amplas e holísticas sobre o direito. Finalmente, tendo em vista o atual campo de pesquisa da autora, é apresentada uma breve reflexão sobre a utilidade de adotar o NRJ nos estudos sobre a implementação da Convenção sobre os Direitos das Pessoas com Deficiência. Esta é uma área de pesquisa a ser explorada.

Palavras-chave: novo realismo jurídico; estudos jurídicos; implementação do direito.

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1. Introduction

'The problem is not simply to know what a rule means, but how it lives and works, how it adapts itself to different relations of life, how it is being circumvented and how it succeeds in frustrating circumvention.'

Eugen Ehrlich (1917)¹

This document departs from the idea that in legal studies, the method to obtain and analyse research material depends on the theoretical approach and, most importantly, on the concept of law accepted in the research.² In other words, the concept of law adopted in a legal study inspires its theoretical approach, which guides the process of planning, collecting, and exploring the research material. From this starting point, the purpose of this article is to suggest that a promising legal theory called the 'New Legal Realist approach', inspired by a 'realist concept of law', might yield useful results in studies of States' compliance with the law, and mainly international law. This is due to the fact that an NLR approach favours interdisciplinary and empirical research to adequately assess the impact of law.

To achieve this purpose, this article is divided into three sections. Following this introduction, section 2 discusses the meaning of the 'realist concept of law' (sub-section 2.1). This includes a brief overview of common perceptions about law and a commentary to understand how international law, and mainly human rights law might benefit from a richer exchange between jurisprudential approaches and social sciences theory and methods (sub-section 2.2). Section 2 also explains the legal theory of New Legal Realism without intending to do so exhaustively (sub-section 2.3). This includes a synthesis of New Legal Realism's distinctive features and a brief historical background of the theory (sub-section 2.4). Moreover, Section 2 reflects on certain promises of New Legal Realism for studies of States' compliance with the law: its interdisciplinary, empirical, and pragmatist dimensions (sub-section 2.3). From the author's perspective, this section briefly addresses the relevance of NLR to analyse States Parties' compliance with the UN Convention on the Rights of Persons with Disabilities (UN CRPD) (sub-section 2.5).

¹ Eugen Ehrlich, 'Judicial Freedom of Decision: Its Principles and Objects' in *Science of Legal Method. Select Essays by various authors*, ed. Ernest Bruncken and Layton Register (Boston: The Boston Book Company, 1917), 78.

² Jaap Hage, 'The Method of a Truly Normative Legal Science' in *Methodologies of Legal Research: which kind of method for what kind discipline?*, ed. Mark van Hoecke (Maastricht: Hart Publishing, 2011), 19.

Lastly, the Section 3 of this article includes a concluding remark.

2. Discussion

2.1 What is a ‘realist concept of law’?

In a doctrinal understanding, law is a comprehensive and rigorously structured science that does not need to resort to any social goals or methods because it is strictly independent. Nevertheless, Realists Augsberg³ and Mertz⁴ assert that doctrine is radically indeterminate, therefore, to equate law with doctrine might result in inaccuracies. The main argument of Realists is that, in some cases, the existence of doctrinally predictable results does not imply the existence of any causal or necessary relationship between legal doctrine and the results of concrete cases in a logical or empirical sense. According to Horwitz⁵ and Carrington⁶, the Realists’ claim of legal indeterminacy is understood as a declaration that doctrine can never be an adequate explanation of legal results. The consideration of the motivations of decision makers and the influence that underlying social and political structures have over legal results is at the core of the idea on the inadequacy of doctrinal explanation.

The indeterminacy of doctrinal legal materials, according to Dagan and Kreitner,⁷ requires understanding law as a dynamic set of institutions dealing with tensions between multiple factors, such as power and reason, science and craft, and tradition and progress. This is the ‘realist concept of law’ (also known as ‘realistic concept of law’) as argued by Macaulay.⁸ Viewed in that light, law is neither conceived only as the doctrinal formulations contained in doctrinal materials nor is it only about

³ Ino Augsberg, Some Realism About New Legal Realism: What’s New, What’s Legal, What’s Real?, *Leiden Journal of International Law*, 28, number 3 (September 2015): 457-467. DOI: <https://doi.org/10.1017/S0922156515000229>

⁴ Elizabeth Mertz, Introduction New Legal Realism: Law and Social Science in the New Millennium, in *The New Legal Realism: Translating Law-and-Society for Today’s Legal Practice*, ed. Elizabeth Mertz, Stewart Macaulay and Thomas W. Mitchel (Cambridge: Cambridge University Press, 2016), 15-25.

⁵ Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Boston: Harvard University Press, 1992)

⁶ Paul Carrington, Hail! Langdell!, *Law & Society Inquiry* 20, number 3 (June 1995): 691-760. DOI: <https://doi.org/10.1111/j.1747-4469.1995.tb00784.x>

⁷ Hanoch Dagan and Roy Kreitner, The New Legal Realism and The Realist View of Law, *Law & Society Inquiry*, 43, number 2 (April 2018): 528-553. DOI: <https://doi.org/10.1111/lsi.12319>

⁸ Stewart Macaulay, New Legal Realism: Unpacking a Proposed Definition, *UC Irvine Law Review*, 6, number 1, (June 2016): 149-168. DOI: <https://scholarship.law.uci.edu/ucilr/vol6/iss2/5>

interest or power politics. Dagan and Kreitner⁹ and Mertz¹⁰ concur in arguing that law is an exercise in reason-giving with inherent dynamism. This dynamic conception of law emerges from seeing the law as the product of society that is in a permanently evolving process with changes in society.

As such, law is always in flux as it responds to a changing world and can be used for projects of social change because of its dynamic character. In other words, law is not 'done', and its operation and meaning are shaped by experience. Accordingly, legal studies could adopt a 'realist concept of law', which refers to law as a social process in 'holistic' terms (or as 'a going institution' as called by Llewellyn).¹¹ In the view of Kingsbury¹² and Kennedy¹³, a 'holistic' concept of (international) law includes legal particularities as the set of legally binding rules and principles applicable to the subjects of (international) law, as well as information about the social context and factual environment in which legal mechanisms operate.

Dagan and Kreitner¹⁴ argue that it is precisely under this 'holistic' approach to law that it is possible to understand how legal actors use new social developments as 'triggers' for ongoing improvement of the law. Indeed, there are 'paradigm shifts' that confirm how law is a social process embedded in the social sciences and humanities. For instance, the UN CRPD set a 'paradigm shift' for disability by moving towards inclusion of rights holders, using a social model and a disability-human rights framework that understands disability as a human rights issue. Kayess and French¹⁵ assert that that these changes in the law about disability are possible because international law is created and used instrumentally. It plays a role in economic, legal, and cultural globalisation processes through catalysing, stabilising, or destabilising. In a similar vein, Shaffer¹⁶ claims that the role played by law is not only that of being an 'instrument of power', but also a set of particular

⁹ Dagan and Kreitner, *The New Legal Realism and The Realist View of Law*, 528-530.

¹⁰ Elizabeth Mertz, *Introduction New Legal Realism: Law and Social Science in the New Millennium*, 20-25.

¹¹ Karl Llewellyn, *My Philosophy of Law* in *Philosophy of Law: Credos of Sixteen American Scholars*, ed. Fred Rothman (Littleton, 1941): 183-197

¹² Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, *European Journal International Law* 20, number 1 (February 2009): 23-57. DOI: <https://doi.org/10.1093/ejil/chp005>

¹³ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, *Harvard Law Review* 89, number 8 (June 1976): 1685-1778. DOI: <https://doi.org/10.2307/1340104>

¹⁴ Dagan and Kreitner, *The New Legal Realism and The Realist View of Law*, 528-530.

¹⁵ Rosemary Kayess and Philip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, *Human Rights Law Review* 8, number 1 (January 2008): 1-34. DOI: [10.1093/hrlr/ngm044](https://doi.org/10.1093/hrlr/ngm044)

¹⁶ Gregory Shaffer, *The New Legal Realist Approach to International Law*, *Leiden Journal of International Law* 28, number 2 (June 2015): 189-210. DOI: <https://doi.org/10.1017/S0922156515000035>

epistemologies, forms of reason-giving, and communicative practices that contribute to societal development. The practical reasoning is central to (international) law and there is a social context in which law operates. Therefore, as discussed below, legal studies should combine normative analyses with insights derived from social sciences to develop a 'realist' sense of how (international) law is applied in a reality that is also dynamic.

2.2 A commentary on the 'realist concept' of international human rights law

In today's dynamic world, the new context in which international law interacts is a transnational one. According to Shaffer,¹⁷ international law is part of the transnational legal ordering of social problems, and these problems can be investigated across levels of social organisation and across different domains of law. For achieving a fully developed human rights legal scholarship, Huneeus¹⁸ proposes that legal studies need to combine the perspectives of jurisprudence and social sciences. For Huneeus,¹⁹ strengthening the study of transnational legal phenomena through theoretically informed empirical study makes human rights legal scholarship more useful and productive. This means that it is necessary to understand that studies of compliance with international law can adopt multiple perspectives and that more effective legal reforms are attainable through empirical observation of reality.

According to Garth and Mertz,²⁰ one legal theory inspired in the above-explained 'realist concept of law' that promotes a richer exchange between jurisprudential approaches and social science theory and methods is New Legal Realism (henceforth: NLR). The next section discusses NLR as a school of thought with increasing acceptance as a relevant theoretical approach to advance a constructive relationship between law and the social sciences.

¹⁷ *ibid.*

¹⁸ Alexandra Huneeus, Human Rights between Jurisprudence and Social Science, *Leiden Journal of International Law* 28, number 2 (June 2015): 255-266. DOI: <https://doi.org/10.1017/S0922156515000060>

¹⁹ *ibid.*, 255.

²⁰ Bryant Garth and Elizabeth Mertz, Introduction: New Legal Realism at Ten Years and Beyond, *UC Irvine Law Review* 6, number 1 (June 2016): 121-136. DOI: <https://scholarship.law.uci.edu/ucilr/vol6/iss2/3>

2.3 What is New Legal Realism?

NLR is a specific legal epistemology encompassing how law obtains meaning, is practised, and changes over time.²¹ This approach contributes insights to legal studies from both empirical research and social science theory. Mertz²² refers to NLR as a 'big tent' perspective to transcend limitations on knowledge. The author asserts 'New Legal Realist work offers the possibility of an integrative effort that reaches not only across disciplines but across people and legal systems.'²³ This kind of legal epistemology might challenge the adequacy of studying the legal system when that concept is defined formally and narrowly owing to the fact that reality is naturally changing and 'messy' as explained by Macaulay.²⁴ In this sense, an NLR approach broadens the 'scene'; it places legal issues in their broader social contexts and follows the 'aspiration' of the scientific study of law.

As a legal theory, Macaulay explains that the main concern of NLR is to discover the meaning of law based on its impact at the point of delivery.²⁵ In so doing, NLR takes doctrine seriously and move from law in books to investigate law-in-action. 'Law-in-action' and 'living-law' are two terms that arose from the Legal Realism approach. They both correspond to the notion of how law works or operates on the ground. The idea of 'the law in action' comes from Professor Roscoe Pound. According to Pound,²⁶ 'law-in-action' focuses on the gap between the law in the books and the actual practices of legal officials and the public in cases of disputes. The idea of 'living law' corresponds to Professor Eugene Ehrlich²⁷ and refers mainly to the norms recognised as obligatory by citizens in their capacity as members of associations. This article is conceived very much in the Pound's tradition of studies of legal effectiveness. Thus, this article uses the phrase 'law-in-action.'

²¹ Shaffer, *The New Legal Realist Approach to International Law*: 190

²² Mertz, *Introduction New Legal Realism: Law and Social Science in the New Millennium*, 22-27.

²³ *Ibid*, 22.

²⁴ Stewart Macaulay, *The New versus The Old Legal Realism: Things Ain't What They Used to Be*, *Wisconsin Law Review*, 2005, number 2 (June 2005): 365-403. DOI: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=896757

²⁵ *ibid*

²⁶ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, *Harvard Law Review* 25, number 2 (December 1911): 140-168. DOI: <https://doi.org/10.2307/1324392>

²⁷ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, (London: Transaction Publishers, 2009, 4th ed), 30-42.

As explained by Augsberg²⁸ and Mertz,²⁹ NLR is a legal scholarship that understands that doctrine and legal processes play a role to elucidate legal outcomes (i.e., NLR is law-centred). Additionally, NLR recognises that the impact of law depends on different factors, such as discretion of actors, social practices, political influence, and multiple issues influencing how law manifests once it reaches the lives of people.³⁰ By identifying those issues, a study underpinned in an NLR approach, contributes to make social systems be aware of those issues to solve them (i.e., NLR is committed to constructive legal action). Macaulay³¹ highlights that NLR also seeks to create a genuinely interdisciplinary form of legal knowledge based on the particularities of the epistemological and normative questions at issue, namely problems that emanate from legal practice (i.e., NLR favours interdisciplinarity in the study of law). Furthermore, as explained by Garth and Mertz,³² NLR scholars focus on the relation between law to social order and social change using a 'bottom-up' approach (i.e., NLR is oriented bottom-up) in addition to 'top-down' approaches in studying law because the central concern is the local delivery of law on the ground.

In legal studies, the purpose of incorporating an NLR approach is to recognise that at the point of delivery, law impacts beyond lawmaker intentions. The focus on 'the impact' of the law was also shared by the original legal Realists, who were concerned with studying the consequences of legal rules in society, as explained in the next section. Nevertheless, NLR extends the original legal Realists' vision and embraces the wide range of social sciences' theories, epistemologies, and 'facts' to study the delivery of law on the ground.

2.4 Brief historical background of the New Legal Realism

The beginning of Legal Realism is chronologically situated in the 1920s and 1930s. Historically, the term 'Legal Realism' was associated with the idea that judges ignore the law and make case decisions at their discretion. However, as elaborated by Cross,³³ Legal Realism does not necessarily deny a role for the law in the judicial decision-making process. Realism simply means that judicial decisions are not based

²⁸ Augsberg, Some Realism About New Legal Realism: What's New, What's Legal, What's Real?, 457-467.

²⁹ Mertz, Introduction New Legal Realism: Law and Social Science in the New Millennium, 15-25.

³⁰ Ibid.

³¹ Macaulay, New Legal Realism: Unpacking a Proposed Definition, 149-168.

³² Garth and Mertz, Introduction: New Legal Realism at Ten Years and Beyond, 125 footnote 15.

³³ Frank B Cross, The New Legal Realism and Statutory Interpretation, *The Theory and Practice of Legislation*, 1, number 1 (May 2015): 129-148. DOI: <https://www.tandfonline.com/doi/abs/10.5235/2050-8840.1.1.129>

on 'formalistic law,' acknowledging the various factors influencing courts. Cross³⁴ affirms that the Realists certainly had it right in the claim that judicial decisions are not 'some algorithmic application of legal materials.' The author claims that judicial decisions, as expressed by the original legal Realists, are influenced by extra-legal circumstances, and what Legal Realism does is to recognise those circumstances looking for answers to questions such as what are those extra-legal factors? When do they apply? Additionally, how can they be shaped to produce more desirable results? Mertz³⁵ and Cross³⁶ concur in arguing that the original legal Realists suggested that decisions could be explained by those factors.

The legacy of the Old Legal Realists was to promote changes in the mind of legal scholars and lawyers to think about how social context influences the delivery of law, mainly how certain real-world influences, outside the realm of doctrine, affect judges' decision making. Consistent with this view, Llewellyn,³⁷ one of the original Realists, called Realism 'a technology.' He claimed that Realism was nothing more than a 'good method' and used ethnography as the primary 'technology' in his legal studies. Shaffer³⁸ also used the term 'technology' to explain law from a pragmatist's point of view. He asserted that legal knowledge arises from engagement with the social world; legal knowledge is developed and used, like a technology, to respond to and resolve problems. To summarise, Realism aimed to describe how judges decide and the key focus of most of the original Realists was appellate judging. As argued by Macaulay,³⁹ the historical relevance of the Old Legal Realism originates from its discredit of formal approaches.

From the novel approach to study law set by Old Realists scholars, in the early 1950s NLR arose addressing questions asked within what Tamanaha⁴⁰ calls the 'third pillar' of jurisprudence or 'Social Legal Theory.' Tamanaha refers to social science approaches to law as a distinct 'third-pillar' of jurisprudence, closer to the so-called 'historical jurisprudence' that takes an empirically oriented angle on law.⁴¹ From the 'third-pillar', law is viewed as a social institution and as instrumental. Such a 'third jurisprudential pillar' emerges as a coherent alternative to natural law (fixed in a

³⁴ Ibid, 147.

³⁵ Mertz, Introduction New Legal Realism: Law and Social Science in the New Millennium, 15-25.

³⁶ Cross, The New Legal Realism and Statutory Interpretation, 144-145.

³⁷ Llewellyn, My Philosophy of Law in *Philosophy of Law: Credos of Sixteen American Scholars*, 183-197

³⁸ Shaffer, The New Legal Realist Approach to International Law, 189-210.

³⁹ Macaulay, The New versus The Old Legal Realism: Things Ain't What They Used to Be, 365-403.

⁴⁰ Brian Z Tamanaha, The Third Pillar of Jurisprudence: Social Legal Theory, *William & Mary Law Review* 56, number 1 (April 2015): 2235-2277. DOI: <https://scholarship.law.wm.edu/wmlr/vol56/iss6/6>

⁴¹ Ibid, 235-238.

moral theorising of law, namely with a normative angle on law) and legal positivism (or analytical jurisprudence with a conceptual angle on law). Tamanaha affirms that these three jurisprudential streams represent genuine theoretical alternatives.⁴²

Under the ‘third pillar’ of jurisprudence, NLR develops an interactive process between theory and practice (empirical research) and focuses not only on courts, as it tended to be in the case for the Old Legal Realism, but also on social actors, and administrative and private parties in a broader view of the social context within which law operates. According to Mertz,⁴³ the first years of NLR were characterized by a sharp division over methodologies within the group of scholars working to integrate social science into schools of legal thought. Undoubtedly, during its evolving process, NLR sets itself apart from other efforts to integrate social science into law or use empirical findings in legal reviews. As explained by Garth and Mertz,⁴⁴ NLR pays attention to epistemology and analytical theory, which makes it different from Empirical Legal Studies or Law and Economics.⁴⁵ Furthermore, Holtermann and Madsen⁴⁶ argue that NLR differentiates itself from Critical Legal Studies by not taking law as an ideology or as structurally indeterminate in principle and adopting a pragmatic problem-solving focus through an empirical methodological approach.

As part of the distinctive character of the NLR, Mertz⁴⁷ asserts that the New Legal Realist approach adds to the law-and-society tradition a focus on ‘translating’ between law and social science. Mertz calls for accomplishing a ‘translation’ by considering first the interdisciplinary communication process itself.⁴⁸ Notably, Dagan and Kreitner⁴⁹ suggest that ‘translating’ could not be the best term to describe the tasks of NLR scholars since what they are really pursuing is ‘interdisciplinarity’. The authors assert that the NLR scholars’ endeavour is ‘more like a joint engineering project than a translation.’⁵⁰ This means that the main task in conducting NLR studies is to look for a way to combine two sets of tools based on a commitment to shifting hierarchies among disciplines (interdisciplinary studies). In other words, NLR is

⁴² *ibid*, 238.

⁴³ Mertz, Introduction New Legal Realism: Law and Social Science in the New Millennium, 15-25

⁴⁴ Garth and Mertz, Introduction: New Legal Realism at Ten Years and Beyond, 121-136.

⁴⁵ Shaffer, The New Legal Realist Approach to International Law, 208-210

⁴⁶ Jakob Holtermann and Mikael Madsen, European New Legal Realism and International Law: How to Make International Law Intelligible, *Leiden Journal of International Law* 28, number 2 (June 2015): 211-230. DOI: <https://doi.org/10.1017/S0922156515000047>

⁴⁷ Mertz, Introduction New Legal Realism: Law and Social Science, 10-15.

⁴⁸ *Ibid*.

⁴⁹ Dagan and Kreitner, The New Legal Realism and The Realist View of Law, 545

⁵⁰ *ibid*, 545.

not about taking findings from social science and putting them into legal reviews, but to improve ways to understand the context that gives meaning to the law.

As an evolving legal theory, NLR's main promises and most significant challenges (primarily its interdisciplinary, empirical, and pragmatist dimensions) are discussed in the next section, which suggests that these NLR's dimensions might yield useful results in studies of States' compliance with international law. The focus lies on briefly illustrating the relevance of an NLR approach in assessing State Parties' compliance with a particular international human rights law: the UN CRPD.

2.5 Adopting an NLR approach in studies of States' compliance with law: a commentary on the UN CRPD

NLR underpins an analysis of the 'law-in-action' (or the 'UN CRPD-in-action'), namely, how the Convention is implemented and how persons with disabilities experience it. NLR, as legal theory when analysing compliance with the UN CRPD, contributes to analyse the social context within which the UN CRPD (as an international human rights treaty) operates. As such, an NLR approach helps to add insights to studies of States' compliance with the UN CRPD from certain promises: interdisciplinary, empirical research, and a commitment to constructive legal action.

Firstly, as explained above in this article, NLR promotes interdisciplinarity and empiricism in compliance analyses. In doing so, NLR highlights the relevance of combining attention to both doctrine and social science. It addresses the UN CRPD as an international human rights legal instrument and the international and domestic legal institutions that play a role in the implementation of the Convention. Additionally, NLR recognises that the impact of the UN CRPD depends on different factors, such as the self-determination or agency of persons with disabilities; actors' understandings of the disability itself and the UN CRPD norms; practices within social systems; political influences; and multiple other issues affecting how the UN CRPD works out once it reaches the lives of persons with disabilities. Without embracing the wide range of social sciences' theories, epistemologies, and research methods, it is not possible to offer an accurate picture of how the UN CRPD is truly implemented. Thus, an NLR approach in analysis of States' compliance might demonstrate the power of 'translating' or communicating legal knowledge with other multiple disciplines. In so doing, NLR offers the possibility of an integrative effort in disability-research that reaches not only across disciplines but also across persons with disabilities and even different legal systems.

Secondly, NLR is committed to constructive analysis of states' compliance with law. This is the pragmatist (or problem-centred) dimension of NLR. Viewed in this light, NLR might encourage disability scholars to pursue an action-oriented research purpose with a more pragmatic emphasis. Thus, the motive to adopt an NLR approach in studies of States' compliance with the UN CRPD is to provide subjects of law with a clear understanding of legal, social, and perhaps cultural issues that influence the implementation of the Convention. By pointing out the problems arising from social systems that affect the 'delivery' of the UN CRPD on the ground (or the UN CRPD implementation), an NLR approach helps social systems to be aware of such issues to solve them. In doing so, NLR underpins using the study of law to improve the living-conditions of persons with disabilities.

The above-mentioned NLR's promises are interdependent and inspire each other. For the author of this article, such promises might yield useful results to the analysis of compliance with the UN CRPD since based on a legal theory that favours interdisciplinary and empirical research, and has a pragmatist dimension, researchers might not only interpret the legal obligations of States Parties resulting from the UN CRPD but also address how States Parties comply with these legal obligations, namely how the Convention has an effect in domestic laws and policies, and, more importantly, in persons with disabilities' lives. In short, an NLR approach might contribute to research 'the UN CRPD-in-action'.

3. Conclusion

This article has explained that the 'realist concept of law' situates law as an exercise in reason-giving that has an inherent dynamism. This concept of law inspires the New Legal Realist scholarship, which has four distinctive features: (i) is law-centred; (ii) is committed to constructive legal action; (iii) favours interdisciplinary and empirical research; and (iv) is oriented bottom-up. The main possibilities of NLR that might yield useful results in studies of States' compliance with law, and mainly international law are its interdisciplinary, empirical methodological approach, and pragmatic-solving focus. These principles assess the impact of the (international) law, e.g., the UN CRPD, not only at the legislative or institutional levels, but also in practice, i.e., in the daily lives of people.

This article is a call for collaborative action among legal and social scientific researchers by considering adopting novel theories, such as NLR. Further research focusing on the effectiveness, feasibility, and acceptability of applying an NLR approach to

the study of States' compliance with (international) law need to be undertaken to inform research on the implementation of the law in practice.

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