

Human Rights between Jurisprudence and Social Science

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Abstract

This article argues that human rights law – which mediates between claims about universal human nature, on the one hand, and hard-fought political battles, on the other – is in particular need of a richer exchange between jurisprudential approaches and social science theory and methods. Using the example of the Inter-American Human Rights System, the article calls for more human rights scholarship with a new realist sensibility. It demonstrates in what ways legal and social science scholarship on human rights law both stand to improve through sustained, thoughtful exchange.

Key words

human rights; Inter-American Court; Inter-American Human Rights System; international law; New Legal Realism

I. INTRODUCTION

To encourage social scientists to study the legal system, Lawrence Friedman famously wrote, ‘Law is a massive vital presence in the United States. It is too important to be left to lawyers’.¹ This article adds, in turn, that the empirical study of transnational legal phenomena – and human rights law in particular – is too important to be left to social scientists. And that is why we need something like New Legal Realism (NLR).

American Legal Realism originally emerged in opposition to two regnant schools of thought, formalism and natural law. In order to understand law and to make law better serve societal needs, the realists claimed, neither the syllogistic reasoning of formalism nor the moral reasoning of natural law sufficed. Scholars and judges must remove the blindfold and explore law at work in the social and political world. The Realists in many ways won the day: they changed how Americans conceived of, practised, studied, and taught law. Further, just as Lawrence Friedman hoped, scholars from disciplines ranging from economics and sociology to history and anthropology today devote themselves to the study of legal phenomena.

Why, then, would we be in need of a *new* Legal Realism? One reason is that human rights law, with roots in claims about universal human nature as well as convention, may be particularly likely to inspire abstract, as opposed to empirically informed,

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¹ L. Friedman, ‘The Law and Society Movement’, (1987) 38 *Stanford Law Review* 763.

theorizing. In a recent book, Eric Posner laments that ‘a hundred papers parsing human rights doctrine to ever finer degrees are written for every paper that takes an empirical approach. Lawyers mainly read and discuss judicial opinions – which affect hardly anyone at all – while ignoring the actual behaviour of governments, NGOs, and individuals’.² His assessment slights important current scholarly developments, some of which will be discussed below.³ But it is arguably a fair tally of legal journals in recent decades. Posner concludes that we should abandon human rights law and focus instead on providing development aid, a practice grounded on more solid science. His lament could be taken instead to show that we need to invigorate human rights legal scholarship through theoretically informed empirical study.⁴

But it is not only legal scholarship that would be enriched by a New Legal Realist approach. As social scientists increasingly study the operation and impact of human rights legal orders, they could use a good lawyer – or better yet a legal scholar. Unlike lawyers, social scientists generally cast law not as a subject of interest in itself but as a site through which to explore various social and political dynamics thematized by their discipline, such as social stratification, or cultural change. Even when the dependent variable is a properly legal one, social scientists are prone to ignore legal doctrine and institutions as independent variables. They may try to explain variation in state compliance with international human rights courts judgments, for example, without considering whether those judgments are legally binding in domestic law.⁵ That is why we cannot leave the empirical study of law to social scientists. Empirical studies informed of the law’s content, and imbued with a sense of law’s partial autonomy, can bring into view real-world legal dynamics social scientists might otherwise miss.⁶

What is new in NLR, then, is not only that the familiar complaint against normative theorizing without empirical data still resonates in our era of transnational human rights law. It is also (and in tension with the conventional understanding of the old Realists) that we need to rescue the idea of human rights law as a phenomenon in some senses distinct from politics and society, and worthy of empirical study in itself.⁷ New Legal Realism can thus be conceptualized as a site of exchange between legal scholars who study legal doctrine and social scientists concerned with legal phenomena. As Erlanger et al. argue, the work of understanding and overcoming

2 E. Posner, ‘Against Human Rights’, 2014 (October) *Harper’s Magazine* 13–16.

3 See also G. Shaffer and T. Ginsburg, ‘The Empirical Trend in International Law’, (2012); 106 *AJIL* 1; E. M. Hafner-Burton, D. G. Victor, and Y. Lupu, ‘Political Science Research on International Law: The State of the Field’, (2012) 106 *AJIL* 47.

4 The contradiction in his argument, in other words, is that he asserts both that we do not have enough empirical research to adequately assess the impact of human rights law, and that human rights law interventions are less effective than development aid.

5 See section 4, *infra*.

6 See S. Liu, ‘Law’s Social Forms: A Powerless Approach to the Sociology of Law’, (2015) *Law & Social Inquiry*, forthcoming (arguing that social scientists in the US have neglected theorizing about law’s autonomy, and over-emphasized the study of how political power shapes legal forms). G. Shaffer, ‘A New Legal Realist Approach to International Law’, in this issue, at 189ff.

7 See V. Nourse and G. Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Spur a New Scholarly Agenda,’ (2009) 95 *Cornell Law Review* 61.

'differences in epistemology, methods, operating assumptions and overall goals' is a central activity for New Legal Realism.⁸ Through this exchange, legal academics learn how to pose and answer empirical questions, and social scientists learn to consider jurisprudence, legal institutions, and law's claim to autonomy in their study. More ambitiously, this site of exchange has the potential to generate and become home to its own original theoretical insights. In the words of Shai Lavi, it may be possible to find 'a means to study law that will, instead of subordinating it to the logic of other disciplines, bring the logic of other disciplines under the critical scrutiny of jurisprudence'.⁹

These arguments about human rights legal scholarship in general will be developed below through discussion of the scholarship on the Inter-American System of Human Rights (IAS). The IAS is growing in social and political influence in Latin America. Accordingly IAS scholarship is evolving from a field of doctrinal analysis conducted by lawyers who work within the Inter-American System towards a more hard-hitting, at times empirical enterprise involving an ever-broader array of legal academics in dialogue with the social sciences. Further, this scholarship puts in conversation scholars from around Latin America as well as the United States and Europe. It provides a fruitful and relatively neglected site through which to explore how a new realist approach can improve human rights legal scholarship by bringing in social theory and empirical methods, even as it inspires social scientists to take human rights law seriously.

The article unfolds in four parts after the introduction. First, it argues that the early IAS scholarship, although dominated by doctrinal studies, always had pragmatist, if not empirical, moments. The article then examines the new empirical turn, showing how recent studies that employ social science method and theory are beginning to deepen our understanding of how the IAS constructs its authority. It then moves on to caution that, in trying to explain the impact of the IAS, some studies from the social sciences overlook legal doctrines and mechanisms at the risk of missing an important part of the picture. Throughout, the article emphasizes scholarship on compliance, as this topic has received the most attention from empirical scholars – perhaps itself a symptom of legalistic thinking. The article closes by showing how the call for greater exchange between social science and law applies to human rights law and institutions in general.

2. OF PURE THEORY AND DIRTY WARS

The early scholarship on the Inter-American System was predominantly written by human rights lawyers who worked directly with the IAS and were

8 H. S. Erlanger et al., 'Is it Time for a New Legal Realism?', (2005) (2) *Wisconsin Law Review* 335, at 336 ('Our goal is to create translations of social science that will be useful even to legal academics and lawyers who do not wish to perform empirical research themselves, while also encouraging translations of legal issues that will help social scientists gain a more sophisticated understanding of how law is understood "from the inside" by those with legal training.')

9 S. Lavi, 'Turning the Tables on "Law and ...": A Jurisprudential Inquiry into Contemporary Legal Theory', (2011) 96 *Cornell Law Review* 811, at 812.

vested in its survival and success. These lawyer-scholars were engaged from the start in a two-tiered struggle. At one level, their scholarship took part in the almost metaphysical quest to find the true meaning of the American Convention – which articulates the ‘essential rights of man’ rooted in ‘attributes of the human personality’¹⁰ – without the guidance of prior jurisprudence. As with human rights scholarship more generally, the bulk of early scholarship on the IAS focused on doctrinal developments, using formalist reasoning or reasoning from moral principles in the style of Ronald Dworkin to make arguments about how the American Convention of Human Rights applies to a particular real-world dispute.

A still current jurisprudential debate exemplifies both the importance and the limits of this normative scholarship. The state’s duty to punish individuals for violations of the American Convention is not mentioned by the text of the Convention, but the Court announced it in *Velasquez Rodriguez v. Honduras*, its first case, and has been developing it ever since. The doctrine has inspired many articles exploring a range of questions. Some consider, for example, whether the state’s duty to investigate and punish flows from the right to life, or the right to justice, or both. Further, does it apply only when the underlying human rights violation is also a crime against humanity, or to all violations of the Convention? Does it outlaw all amnesties, or only self-amnesties? Does it trump procedural safeguards like *res judicata*, double jeopardy, and statutes of limitations, which were also created to protect rights and check state power? Does it apply in the same way after civil wars as after transitions to democracy?

These inquiries play an important role. They legitimize and spread knowledge about the Inter-American System in the legal academy, and they are crucial to developing a clear and consistent body of jurisprudence. Further, by erecting a wall between doctrine and politics, this scholarship insulates the IAS from the perception and threat of political interference. A shared hallmark of formalist and natural law legal reasoning is that they define law as autonomous from the political realm. The IAS first emerged as an influential actor during the era of the dirty wars, during which political actors used brutal legal and extra-legal tactics to violently repress political dissent. Distancing from politics was key. In an environment where law lacks democratic legitimacy, human rights law’s claim to originate not only in state consent but also in a universal morality provides an alternative form of legitimation.¹¹

But it is also the case that a body of scholarship oblivious to the real world leaves itself vulnerable to attack in a way IAS scholars could not afford. The second tier of struggle in which these scholars were engaged was that of consolidating a fragile new legal system in a region of military dictatorships and Cold War tensions and, later, transitions to democracy and post-conflict

10 Organization of American States, American Convention on Human Rights, 22 November 1969, OASTS No. 36, 1144 UNTS 123.

11 See M. Villegas, *Les Pouvoirs du Droit: Étude Comparée de Théories Sociopolitiques du Droit*, forthcoming (my translation), Chapter 7.

processes. They frequently had to descend from pure theory to grapple with institutional dynamics, state recalcitrance, and the politics of the Organization of American States (OAS), to which the IAS belongs. At least some IAS scholarship always had a realist sensibility and engaged in consequentialist reasoning.

It was not, however, empirically informed consequentialism. In Latin America, where most IAS scholarship is generated, the old Legal Realism's call for empirical study failed to find ready ears. European and particularly French theorists such as Francois Geny had a profound influence in the region in the early to mid-twentieth century: local scholars used their work to shatter the rigid formalism that had dominated the academy.¹² But, as Diego López Medina argues, the particular reading of realist works in Latin America emphasized their anti-formalist ideas without heed to their 'scientific component'.¹³ The call for data-based inquiry was 'so foreign to the local juridical tradition that it could not be extracted even from texts that announced it with great clarity'.¹⁴ As the social sciences evolved and grew in the region, law schools kept their distance. Jurisprudential debates oscillated between formalist and anti-formalist traditions without a strong empirical strain. To this day, Mauricio García Villegas characterizes the region's dominant juridical culture's attitude as one of 'indifference, and even contempt' toward the social sciences and public power.¹⁵

A volume published in 1994 provides an example of this politically attuned but empirically thin scholarship. The end of the dictatorship era in the 1990s thrust the Inter-American System for Human Rights into an identity crisis. The region's governments began to argue to the OAS that in times of democracy, states themselves would handle individual claims of human rights violations. The Inter-American Commission should devote itself instead to promoting human rights education and consulting with states.¹⁶ In 1993, the OAS General Assembly adopted a resolution to reform the IAS, unleashing an important debate and reform process.¹⁷ The volume, published to inform the ongoing debate, grappled directly with non-doctrinal issues such as the impact the IAS has had in changing national practices, the at times tense relationship of the Commission and the Court, and the role of human rights review in democracy.¹⁸ But even as it advocated for particular policies and reforms, the scholars did not actually employ empirical methods, nor did they engage in dialogue across disciplines more broadly.

12 These, in turn, had been received from the *École de l'exégèse* and the German conceptualism, and rearticulated in locally adept terms. See D. L. Medina, *Teoría Impura del Derecho: La Transformación de la Cultural Jurídica Latinoamericana* (2004), Chapter 3.

13 See Medina, *ibid.*, at 274; See also J. Linarelli, 'Anglo-American Jurisprudence and Latin America', (1996) 20 *Fordham International Law Journal* 50.

14 See Medina, *supra* note 12 at 274 (my translation of 'El "componente científico" del nuevo antiformalismo francés era tan ajeno a la tradición jurídica local que no podía siquiera ser extraído de los textos que lo anunciaban con gran claridad ...').

15 See Villegas, *supra* note 11.

16 F. Gonzales, 'El Sistema Interamericano de Derechos Humanos: Transformaciones y Desafíos' (2013) 63, at 67.

17 *Ibid.*

18 See, e.g., J. Méndez and F. Cox (eds.), *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos* (1998); See also González, *supra* note 16.

Victor Rodríguez Rescia's chapter, for example, is about implementation of the Inter-American Court's orders, or compliance,¹⁹ which early on emerged as a particularly salient issue. One might think that a study of compliance requires looking beyond the law – at the least, one must examine the defendant state's behaviour after judgment. Rescia's chapter, by contrast, stays trapped within the law, carefully interpreting what the American Convention and the Court's rules say about compliance, and then listing the laws a handful of arbitrarily selected states have on the books in order to implement Court orders. Rescia therefore cannot reliably tell us whether states comply. He cannot detect compliance patterns across states, or even whether the mechanisms states put in place make a difference. His article exemplifies why, through the turn of the millennium, IAS scholarship could not be described as a New Legal Realist enterprise.

3. THE TURN TO DATA AND THEORY

As the Inter-American System has grown in political salience, its scholarship has matured and diversified. One strand of studies has come to explore the Inter-American System with a New Realist sensibility. Often these scholars are motivated by the same concern that motivated earlier reformist scholarship – how to fortify and improve the System. In particular, non-compliance with Court and Commission orders, long perceived by many in the IAS as a serious problem, has remained a focus.²⁰ Two features, however, distinguish them from past studies.

First, scholars no longer rely exclusively on personal experience with the system as data. They analyse systematic data sets to gain a more accurate analysis of the problems and their possible solutions. An important study published in *Sur Journal*, for example, for the first time compiled and analysed compliance data reported by the Inter-American Court and Commission in order to offer 'quantitative information about a topic that continues to present itself through mainly narrative approaches in the literature'.²¹ Unlike Rescia's earlier study, then, they can report on patterns of state compliance behaviour. Indeed, the study confirmed many important compliance dynamics that the scholarship had already presumed to be true, such as a low global compliance rate of under 36 per cent, and a dramatic drop-off in compliance rates for remedies requiring investigation and punishment (14 per cent).²² Further, they found that participation of international NGOs in the proceedings correlates with higher compliance.²³ Data-driven analysis to confirm or reject hypotheses about

19 V. R. Rescia, 'La Ejecución de las Sentencias de la Corte', in J. Méndez and F. Cox, *supra* note 18, at 449.

20 As Jose Miguel Insulza, the Secretary-General of the Organization of American States, has noted: 'non-compliance of the resolutions of the [Inter-American] System ... gravely damages it'. J. Insulza, 'Sistema Interamericano de Derechos Humanos: Presente y Futuro' ('Inter-American System of Human Rights: Present and Future'), in *Anuario De Derechos Humanos* (Yearbook of Human Rights) (2006), 119, at 124, available at <www.cdh.uchile.cl/publicaciones/anuarios> (accessed 3 February 2015).

21 F. Basch et al., 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions', (2010) 7 *Sur – International Journal of Human Rights* 9, at 10.

22 *Ibid.*, at 19.

23 *Ibid.*, at 30.

compliance and the IAS was new. The authors were also able to make empirically informed policy recommendations. They argued that the Court and Commission should be more specific in how they supervise orders, unbundling complex orders, such as the order to investigate and punish, so that each distinct action required receives its own compliance rating. Disaggregation of the orders could reveal with more precision where the obstacles to compliance lie.

Second, recent IAS scholarship has also begun to engage theoretical approaches developed in the social sciences. In a path-breaking article in the *American Journal of International Law*, James Cavallaro and Stephanie Brewer inquire into the IAS's compliance issues, as well as its ability to have an impact on state practices more generally.²⁴ Through dialogue with the social science literature, however, they were able to sidestep certain legal categories that constrained analysis. Under a formalist legal perspective, the problem of compliance is viewed as involving only two actors, the court and defendant state, and as unidirectional, with the defendant state obeying (or not) orders from the Court. Cavallaro and Brewer break away from this unilinear conception, triangulating so as to show as well the relationship between the Court and social movements. They advocate for the Inter-American Court to act with political nuance, not just legal accuracy, and to emphasize issue areas in which it would have strong civil society partners in pushing toward compliance and reform. This perspective draws from socio-legal studies the idea that courts are political agents who can use their power to advance particular agendas, and that a court's judgment can have indirect social impact. Indeed, it caused discomfort among IAS actors who believed the Court should not view itself as a strategic political actor. What was new in this article was not empirical data: like many IAS scholars before him, Cavallaro drew from his own litigation experience in the IAS as a point of departure for reflection. But the authors were able to step outside a legal frame and draw on socio-legal theory to re-describe the problem of compliance.²⁵

A third study further unravels the legalist framing of compliance. The state, conceived as a singular entity, is formally the legal subject of the orders issued by the Court. Accordingly early IAS compliance studies tended to conceptualize the state as the only relevant actor. Indeed, they had little choice in the matter since they relied on data generated by the IAS itself. Drawing on the political science literature on the emergence of the European Court of Justice and its compliance partners, Huneeus sidestepped the category of 'state party' and examined the role of diverse actors within the state in implementing judgments. The Inter-American Court is unique in the extent to which it issues complex remedial orders that require action not just by the executive, but by legislative and judicial actors as well. Huneeus categorized the Courts' orders by which actor within the state had the ability to comply, revealing a distinct set of compliance patterns previously hidden from view. Most interestingly, the more state actors that an order involves, the less likely

24 J. Cavallaro and S. Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court', (2008) 102 AJIL 768.

25 Their article includes cites to social science scholars such as Anne-Marie Slaughter, Rachel Cichowski, and Kathryn Sikkink.

is compliance to that order. The study also found that of all sub-state actors, courts were the least likely to implement Inter-American Court orders. It was thus able to suggest that, in order to increase compliance, it is important to understand the distinct interests and politics of diverse state actors, and to encourage states to create intergovernmental agencies to promote co-ordination and foster dialogue among distinct state actors.

The study also contributed to the development of the emerging field of study of international courts by revealing an aspect of transnational judicial dialogue that had not yet been theorized, but that may be relevant in other settings. In the EU System, it is national courts who typically initiate the conversation with the European Court of Justice, and they do so when it behooves them, creating a dynamic of mutual co-operation that has sustained and fortified the ECJ.²⁶ The Inter-American Court, by contrast, frequently issues judgments that command national courts to undertake particular actions, placing itself in a top-down command relationship vis-à-vis domestic courts. That the orders generate resistance is, thus, perhaps not surprising, and suggests that court dialogues are not always as mutually beneficial as the prior literature had argued. By gathering data and drawing from social science theories, IAS legal scholars were thus able to contribute new insights about the operation of the IAS, leading to more effective policy suggestions based on empirical observation, and to greater knowledge about international courts generally.

The examples of empirical IAS studies given so far have focused on the operation of the system and its impact, and on policy recommendations for institutional reform. But empirical study can also inform jurisprudence: it can be relevant to judges as well as reformers. Human rights law draws legitimacy in great part from its claim to articulate truths about our moral nature. In judicial interpretation of human rights law, therefore, moral reasoning, as opposed to consequentialist reasoning, may appear more legitimate and more attractive than it might, say, in the trade law setting. This has implications for empirical scholarship. Whereas consequentialist reasoning can be informed by empirical knowledge, reasoning from abstract moral principles takes place on a plane removed from questions of politics, history, contingency, and causal relations. The draw to moral reasoning may help explain why there has been, as Posner writes, relatively little empirical work within the doctrinal human rights scholarship.

New Legal Realism serves to remind us that human rights jurisprudence can also effectively draw from empirical knowledge about the world. As Brian Tamanaha argues, jurisprudence traditionally had three pillars: formalism, natural law, and social legal theory, which is 'characterized by a consummately social view of the nature of

26 K. Alter, 'Who are the Masters of the Treaty? European Governments and the European Court of Justice', (1998) 52 *International Organization* 121; W. Mattli and A.-M. Slaughter, 'Law and Politics in the European Union: A Reply to Garrett', (1995) 49 *International Organization* 183; A. S. Sweet, 'Judicialization and the Construction of Governance', (1999) 32 *Comparative Political Studies* 147; J. H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', (1994) 26 *Comparative Political Studies* 510.

law'.²⁷ This 'third pillar of jurisprudence' could be an important aspect of the work on the IAS. The current debate about whether the Inter-American Court should anchor its indigenous rights jurisprudence on the right to property is illustrative. A reading based on moral principles might argue that the Court should emphasize the right to life, and the doctrine of *vida digna*, rather than the right to property.²⁸ A more empirically-based approach might counter, however, that domestic legal systems all already have a right to property, whereas few have anything akin to *vida digna*.²⁹ Further, communally held property can lead to greater communal welfare and stronger community identity.³⁰ Thus, it may be more resonant and effective for the Court to continue to emphasize property in its indigenous rights judgments. Empirical knowledge, in other words, is useful not only to lawyers in their role as activists engaged in the operation and reform of the institutions of the Inter-American System, but could also inform lawyers and judges engaged in the construction of an effective, coherent body of jurisprudence.

4. LEARNING THE LAW

As the IAS has gained political salience, its circle of scholarly interlocutors has expanded. Previously IAS scholarship was the handiwork of human rights lawyers with close, ongoing relationships to others working within the system. Now, we begin to hear from political theorists and constitutional and criminal law theorists who have interest in the IAS as an object of study, not as a personal area of practice or a political project, ensuring a more robust exchange of ideas. Critical treatments of the IAS from Roberto Gargarella, an Argentine constitutional lawyer and political theorist, have sparked debates within the IAS about the role of democratic theory in a human rights judicial regime.³¹ Criticism from criminal lawyers has arguably caused the Inter-American Court to be more deferential when it demands remedial actions that involve local justice systems.³² Even if these are not directly empirical or socio-legal studies, they allow the IAS to become more aware of itself in a broader political and social context.

27 B. Tamanaha, 'The Third Pillar of Jurisprudence', (2013) Washington University in St. Louis Legal Studies Research Paper No. 13-04-01, at 4 (Available at SSRN: <<http://ssrn.com/abstract=2256622>> (accessed 3 February 2015)). See also G. Shaffer, this issue, 189ff.

28 See T. M. Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court', (2014) 35(1) *University of Pennsylvania Journal of International Law* 113.

29 I thank Tatiana Alfonso Sierra for this observation.

30 T. A. Alfonso Sierra, 'Redistributing through Property Rights? Collective Land Tenure Systems and Welfare for the Rural Poor in Latin America', (2014) (on file with author).

31 R. Gargarella, 'Sin Lugar para la Soberanía Popular. Democracia, Derechos y Castigo en el Caso Gelman', (2012) at <www.law.yale.edu/documents/pdf/sela/SELA13_Gargarella_CV_Sp_20120924.pdf> (accessed 3 February 2015)

32 See, e.g., K. Ambos, E. Malarino, and G. Elsner (eds.), *El Sistema Interamericano De Protección de los Derechos Humanos y Derecho Penal Internacional*, (2012), available at <www.kas.de/rspla/es/publications/21282/> (accessed 3 February 2015); See also D. R. Pastor, 'La Deriva Neopunitivista de Organismos y Activistas como Causa del Desprestigio Actual de los Derechos Humanos', (2005) 1 *Nueva Doctrina Penal* 73; F. F. Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and its Dangers', (2007) 23 *American University International Law Review* 195; E. Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights', (2012) 12 *ICLR* 665.

We also begin to hear from social scientists. The engagement of social scientists brings the prospect of greater research funding, and of studies with greater methodological and socio-theoretical sophistication. Earlier compliance studies relied mostly on data that the IAS itself generates. That means scholars were stuck with the categories used by the IAS, and the ideas on which they were premised. By contrast, social scientists have been more likely to complement IAS-generated data with data drawn from independent sources. In the realm of IAS compliance studies, studies by Hawkins and Jacoby and Hillebrecht enrich our reading of IAS compliance reports through comparison to the ECHR, revealing that the two systems are not as far apart in terms of compliance as previously thought.³³

While these works yield new data and insights, they also reveal the blind spots of social science. In her path-breaking comparative study of compliance to human rights tribunals, Hillebrecht argues in a case study that Colombia's pattern of compliance to Inter-American Court orders can be best explained by executive interest. That is because, she asserts, the Colombian courts are 'subordinate to the executive branch'³⁴ and therefore 'the scope and degree of compliance is left to the president's discretion'.³⁵ The problem with this explanation is that Colombia is home to one of Latin America's most influential judicial bodies and arguably the Inter-American Court's most dynamic judicial interlocutor, the Colombian Constitutional Court. Not only was the Colombian Constitutional Court the first Latin American court to receive the doctrine of the 'constitutional block,' by which it interprets constitutional rights through the prism of the American Convention and the Inter-American Court's judgments, but it single-handedly declared that the Inter-American Court's judgments are self-executing, and thus immediately binding in domestic law.³⁶ (The text of the Constitution makes no mention of this.) Thus, when the Inter-American Court orders Colombia to investigate and punish a violation, the national prosecutor and judiciary are bound to do so regardless of executive action – or inaction as the case may be. It is true, as Hillebrecht argues, that the Colombian executive plays a large role in compliance, especially with orders to investigate and punish in sensitive matters like the crimes of the paramilitary, who have links to the state. But it is equally clear that a nuanced understanding of Colombia's compliance behaviour requires at least consideration of the domestic legal status of the Court's judgments, and of the partial autonomy of two high courts,³⁷ the military courts, and a robust legal complex. Similarly, a multi-country comparison of state compliance to human rights tribunals should consider legal factors such as the domestic status of an international court judgment and the constitutional status of the underlying treaty as independent variables.

33 D. Hawkins and W. Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights', (2010) 6 *Journal of International Law and International Relations* 35; C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2014).

34 See Hillebrecht, *supra* note 36, at 68.

35 *Ibid.*, at 69.

36 See, e.g., Colombian Constitutional Court, Judgment C-04 2003.

37 Colombia has a Supreme Court and a Constitutional Court.

Social scientists, in other words, need to lawyer-up and delve down into the legal differences between states. This is already happening to some extent. An example of the growing exchange between law and social science is the IAS Network, funded by the Leverhulme Trust in England. This is a research network, led by social scientists from Latin America and Europe, that incorporates actors of different disciplines and continents.³⁸ Its first project is that of creating an edited volume about the impact of the IAS on domestic politics. With the concept of impact, these scholars are able to examine whether and how the IAS shapes the behavior of actors beyond (but also including) compliance. As the law and society scholarship has shown, judgments can lead rich lives beyond the particular case that gives rise to them. For example, judgments can become discursive resources on which activists rely to advance their claims in the political arena, regardless of judgment compliance. They can act as constraints or guides on subsequent state behaviour, changing the behaviour of states that were not party to the particular judgment, and perhaps not even party to the underlying treaty. They can also reshape popular understandings and interpretive frames, as has occurred with gay marriage in the United States and certain Latin America states. And, of course, they can create backlash. By moving beyond compliance, then, the inquiry broadens to include many social and political dynamics previously obscured.

Moving forward, it will be important for empirically minded scholars to engage not only with the law itself, but also with the doctrinal and philosophical scholarship on the IAS. Legal scholars in Europe and Latin America have been writing about and advocating for the emergence of a rights-based constitutional law of Latin America, a *ius constitutionale commune americano*.³⁹ The project was conceived in reference to political theories about the role of democracy and rights, and the safeguarding of constitutional commitments through domestic and [#] international judicial review. The Inter-American System, and the Court in particular, are viewed as playing a central role in the construction and hierarchy of this body of law. Empirical scholars could enrich the study and critique of the *ius constitucional commune* project. It would be useful, for example, to understand where these legal proposals are coming from (which universities and institutional actors are advocating for them), who stands to gain or lose from such a project, and how it might work on the ground in the various political and social contexts of Latin American states, including the New Left states so critical of the Inter-American System's institutions in recent years, and states such as the Dominican Republic, whose constitutional court seems quite content to distort human rights law for political gain.⁴⁰ Empirical engagement with this project is important both as a political matter, and as a way to understand power and rights more generally.⁴¹

38 The author is a member of this network.

39 See A. von Bogdandy, H. Fix-Fierro, and M. M. Antoniazzi (eds.), *Ius Constitutionale Commune en América Latina. Rasgos, Potencialidades y Desafíos* (2014).

40 S. Cantón, 'La Máquina del Tiempo Dominicana,' *El País*, 14 November, 2014.

41 Note that several chapters of the volume already engage the questions of political context and empirical study. See, e.g., A. Malamud, 'El Contexto del Diálogo Jurídico Interamericano: Fragmentación y Diferenciación en Sociedades Más Prósperas', 107–24 and O. Parra Vera, 'El Impacto de las Decisiones Interamericanas: Notas

5. CONCLUSION

The article has shown how IAS legal scholarship, on the one hand, and social science scholarship on the IAS, on the other, would benefit from a New Realist sensibility. But while the argument here has focused on the history and scholarship of the IAS as an example, it applies to the study of international human rights law generally. More than other international legal orders, human rights systems claim to be legitimate not (or not only) because they are born of a political compromise enshrined in a convention, but because they articulate claimed truths about our moral nature.⁴² Doctrinal scholarship that pays heed to these ideals even as it grapples with the treaty text and jurisprudence is important to the legitimation of human rights systems, and to the evolution of a coherent, progressive and relevant body of jurisprudence. But it is also true that, like the IAS, supranational human rights systems exist in a real world of scarce resources and exhibit varying levels of effectiveness. More pointedly, most are in an existential struggle against noncompliance, co-optation, backlash, or irrelevance. It is crucial that they be understood as political institutions, and that their interactions with and impact on other actors such as states, the entire range of sub-state actors, civil society, and other international institutions be subject to empirical study. The answer to Posner's complaint is that human rights legal scholarship needs to engage in both realms of inquiry, jurisprudential and social scientific, and will be most useful and productive where scholars from both camps are in conversation.

sobre la producción académica y una propuesta de investigación en torno al 'empoderamiento institucional' 383–420 in von Bogdandy, *supra* note 42.

42 Other treaties, such as those underlying the World Trade Organization or the Kyoto Protocol, more clearly claim roots in political compromise. While the criminal courts also have idealistic roots, concern with due process demands a more text-based interpretive approach.