

# Law from a realistic point of view of scandinavia and america

[Countries](#), [United States](#)



Scholars in this theory are perhaps more practical than theoretical as compared to the others as they try to define law from a realistic point of view by calling a spade a spade and not a big spoon. Generally, almost every scholar wants their theory to be taken as the gospel truth and this may overshadow their sight. The fact is that we do not live in an ideal society where things are predicted and happen in that order. This is where many scholars fail by imagining that we live in a society that is clearly cut out.

### **American realism**

The American realists, for instance, observe that there are many instances where ‘ laws’ have been enacted by Parliament or any other legislative body but are not really laws until the judges say they are. Laws gain their legitimacy after the judge says that the law is valid and can be used to determine certain rights. In this school of thought, the judge is the maker of the law as it is him or her who determines what law he or she is to apply to a certain set of circumstances. John Chipman Gray, one of the theorists of legal realism describes law as: “ The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.” He clearly identifies that legislation is merely but a source of law but the final definer of the law is the judge. Were it not for the role played by judges, such legislation is in the state of a coma and requires the attention of the judge to have life.

In Kenya, for instance, there are many enacted laws in our Statutes and Constitutions that give certain rights to the citizens of Kenya. However, in

most cases, these rights will not be realized until the matter is before a court of law and the judge determines these rights depending on the facts of the case. Although the Constitution recognizes the rights of persons with disabilities, it is not uncommon to hear of cases where such persons have been denied these rights and have to seek the interference of the courts to establish and determine that they are entitled to these rights. It is at this point that the judge interprets and defines what the law relating to persons with disabilities is.

To elaborate further on how scholars view the law in this school of thought is that judges will more often than not, make law based on their opinion, experiences, emotions and interests. Majority of the decisions made by judges will lean towards what their personality entails. This is despite the fact that they are meant to put themselves in the shoes of a reasonable man and determine the case purely on its merits. Of course this reasonability is relative as each society differs from another for a number of reasons. If a judge perhaps is more liberal, it is expected that cases of this nature coming before him have a high probability of success unlike if it went before a judge who was not open to such ideas. The more conservative judges often have a strict sense of a particular law although the circumstances may have changed from the time the law was legislated.

A recent case in Kenya showed how a High Court judge interpreted cohabitation over a long period of time to mean marriage. The case involved a prison warden who was fighting for burial rights over his deceased wife's body. His 'in-laws' had insisted that he could not bury her at his home as

they were not married. Justice Majanja in his judgement, insisted that there was no need for a couple to follow customary rites in order to be considered married in the society. The fact that the couple had stayed together for a long time and behaved in a way that could make one presume that they were married was enough to arrive at that inference. This would never have been expected from some judges who are of the opinion that a marriage needs to be formalized and registered. Upon further research into the cases this particular judge had determined, I notice a trend. He was more receptive of situations that arose due to contemporary ideas that may not have recognized by the law. It is my presumption that his personality is inclined towards that direction and that definitely influences his decisions.

The glitch of this principle is that there would be some uncertainty in the law if judges base their decisions on opinion, experiences, emotions and interests. The meaning of law will then be definitely changing from time to time depending on the personality of the judge. The fact that Kenya is a common law country guided by judicial precedents further complicates it as judges may fail to arrive at the same decision despite the set of circumstances being the same. Moreover, if the law really is what the judge says it is, how then do we ensure that the citizens of a country participate in law making if the law is at the judge's foot? Or is it a case of the end justifies the means? It may be hard to engage the public while making the law as it is the judge who comes up with the decision in chambers and is not to be inclined towards one party. In my opinion, the only influence that the judge can get in this position is the persuasion of parties while in court.

**Scandinavian realism**

Unlike American realism whose focus is on the courts, Scandinavian realism is quite different as it centers the law on experiments and experiences. This can be seen from the experiences of the a number of Scandinavians who grew up in a society stricken with poverty and a lot of inequality among them. One will notice that a number of their laws have their origin from that period. Scholars in this school of thought critic natural law and the whole concept of morality and nature being the cornerstone of laws. They believe that the law should be more subjective than objective. This is unlike natural law which has an objective purpose since it is universal. It should not be influenced by external factors of morality to gain its validity. To them what becomes law will depend on one's experiences after experimenting with a number of things.

One of the proponents of this theory is Hagerstrom who defines law as a result of one's mindset of endorsing or criticizing experiences and experiments they have had at different times. Obedience will depend on the wording of the laws and if they speak to the person. For instance, justice will be subjective as it will be a personal attitude towards the words of a particular law. An individual will be able to identify whether the law speaks a sense of justice to them or if it is silent on that and does not require obedience. I am of the opinion that the experiences of a certain group of people may provoke deeper emotions that determine whether certain laws voice obedience to them.