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# **A CRITICAL ANALYSIS ON AMERICAN REALISM AND SCANDINAVIAN REALISM: SIMILARITIES AND DIFFERENCES**

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## **ABSTRACT**

The paper compares and contrasts Scandinavian Realism with American Realism, looking at their underlying ideas, points of similarity and difference, and effects on legal theory and practice. American Realism was founded in the early 20th century by individuals such as Karl Llewellyn, Jerome Frank, and Oliver Wendel. It placed a strong emphasis on the empirical study of law and expressed scepticism regarding formalist legal reasoning. On the other hand, Scandinavian Realism emerged in the middle of the 20th century in Scandinavian nations, where academics like Alf Ross stressed conceptual analysis and the study of legal language in addition to empirical investigation.

Both American Realism and Scandinavian Realism reject the notion of law as a closed system governed only by rules and are dedicated to the empirical study of law and criticism of formalism. They cast doubt on the idea of a mechanical execution of the law by highlighting the significance of understanding law in practice and the practical implications of legal decisions. Their methodological stances and philosophical underpinnings, however, differ. While Scandinavian is influenced by moral scepticism and Scandinavian legal positivism, American realism is more frequently linked to instrumentalism and pragmatism. Drawing on its roots in Scandinavian legal positivism, Scandinavian's methodology emphasizes conceptual analysis and the study of legal language more than other approaches.

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Both schools of thinking have had a significant influence on legal theory and practice despite these disagreements. American Realism has influenced legal practice and scholarship outside of the US on a worldwide scale. On the other hand, Scandinavian Realism has mostly impacted legal theory in Scandinavia, but it has also made significant contributions to legal methodology and the study of legal language. Comprehending the distinctions and parallels between American and Scandinavian Realism is essential to appreciating the intricacy of legal frameworks and the continuous development of legal theory. This comparative study advances knowledge of the many perspectives on legal realism and how they affect research and practice in the modern day.

**Keywords:** Legal Realism, American Realism, Scandinavian Realism, Similarities, Differences, Relevance

## INTRODUCTION

**“The life of the law has not been logic; it has been experience”<sup>2</sup>**

Legal formalists' then-dominant conceptions of law, which cantered on what can be called their own false assertions, gave rise to legal realism, also referred to as "Analytical Positivism".<sup>3</sup> A theory of law and adjudication is known as legal realism. Its main focus is on judicial procedure via which judges interpret, announce, expand, overrule, and occasionally implement laws.

Formalists believed that legal reasoning is a science and that law is nothing more than logic, with individuals with legal training and the appropriate tools being able to discern the logic inherent in any given situation. Formalism would have us believe that the law is unaffected by politics or the human decisions made by those who practice it.<sup>4</sup>

Originating in US law schools, American legal realism dominated the conversation during the 1920s and 1930s. The emergence of legal realism was accompanied by a type of explosion in the number of cases filed by the general public at the start of the 20th century.<sup>5</sup> This was seen by the

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<sup>2</sup> Oliver Wendell Holmes, Jr., *The Common Law* 5 (M.D. Howe, ed., 1963) as quoted in, *infra* n. 14 at 190.

<sup>3</sup> John D Finch, *Introduction to Legal Theory* 13 (2nd Indian Reprint, 2009).

<sup>4</sup> J E Penner and E. Mellisaris, *McCoubrey & White's Textbook on Jurisprudence* 123 (4th ed., 2008).

<sup>5</sup> The early writings of American Legal Realism movement, although not acknowledged by the fellow realists in full, could be traced to the writings of Joseph Bingham. See “What is the Law?” Part I & II, 11 MICH. L. REV. 1 & 109 (1912).

State's court system, as seen by the rise in the number of judges. As a result, far too many people made decisions based on a variety of factors, frequently knowing very little or nothing about what was done in other parts of the nation regarding a comparable circumstance.

A number of academics have contributed significantly to the field of legal scholarship Felix Cohen, Herman Oliphant, Hessel Yntema, Jerome Frank, Karl Llewellyn, Max Radin, Oliver Wendell Holmes, Underhill Moore, and Walter Wheeler Cook, to mention a few. The realists themselves contended that realism is not a school of thought or a collection of legal doctrines, but only an intellectual movement.<sup>6</sup>

The Scandinavian realists concentrated on the substantive philosophical ideas from semantics and epistemology, in contrast to their American counterparts.<sup>7</sup> The legal philosophy writings of experts from Nordic nations that were mostly unaffected by the common law system are referred to as Scandinavian realism. In the Nordic area, the legislation is mainly uncoded. As a result, the judges have a significant say in how cases are decided.

According to Scandinavian realists, "the science of law is a true science like any other concerned with facts and events in the realm of casualty" because "the law can be explained only in terms of observable facts." Scandinavian realists placed a lot of emphasis on the intersection of psychology and law.<sup>8</sup>

They explained in the process how laws have a specific effect on how people behave. Scandinavian realists take into account both the psychological consequences of law and the physical reality.

To summarize, the shift from legal formalism to legal realism is embodied in the quote "The life of the law has not been logic; it has been experience". Realists highlight how experience shapes legal theory and judicial decisions, in contrast to formalism's idea that law is solely intellectual and detached from human experience. This change was influenced by academics like Felix

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<sup>6</sup> Suri Ratnapala, *Jurisprudence* 10 (2009) (Relying on observation of Karl Llewellyn)

<sup>7</sup> 3 Brian Leiter, *American Legal Realism in Golding and Edmundson*, *Blackwell Guide to the Philosophy of Law and Legal Theory* 58 (2005).

<sup>8</sup> Michael Freeman, *Lloyd's Introduction to Jurisprudence* 842 (9th ed., 2014).

Cohen and Jerome Frank, as Scandinavian realists emphasized the emotional and behavioural effects of legal judgments. Legal realism ultimately emphasizes the complexities of law and how it relates to real-world situations, stating that the rich tapestry of human experience, rather than cold, rationality, contains the essence of law.

## **RESEARCH DESIGN**

### **RESEARCH AIM**

To perform a critical analysis that highlights the parallels and differences between Scandinavian and American legal realism, with the goal of advancing knowledge of jurisprudential theory.

### **RESEARCH OBJECTIVE**

- To investigate the theoretical underpinnings and fundamental ideas of American legal realism.
- To investigate the methods and theoretical foundations of Scandinavian legal realism.
- To determine the similarities and differences between Scandinavian and American legal realism.
- To evaluate how these parallels and discrepancies affect modern legal thought and practice.

## **RESEARCH METHODOLOGY**

The paper is based on qualitative data and is based on the doctrinal method of research.

### **RESEARCH QUESTIONS**

1. What theoretical underpinnings and fundamental ideas underpin American legal realism?
2. What are the methods and theoretical foundations of Scandinavian legal realism?

3. What are the philosophical tenets and legal methodologies that distinguish American and Scandinavian legal realism from one another?
4. What effects has legal realism from the United States and Scandinavia had on modern legal theory and practice?
5. What effects do these parallels and discrepancies have on our comprehension of legal theory development and jurisprudential theory?

## **SCOPE AND LIMITATION**

- The primary areas of study will be American and Scandinavian legal realism, with a focus on comprehending both their theoretical underpinnings and real-world applications.
- The research will examine the central ideas, approaches, and philosophical tenets of every legal school of thought.
- The course will utilize notable court cases and legal rulings that were impacted by American and Scandinavian legal realism as case studies and examples.
- The study of Scandinavian legal realism may be constrained by the paucity of original materials and academic literature on the subject compared to that of American legal realism.
- The study may not go in-depth into the socio-political settings that influenced the formation of American and Scandinavian legal realism, preferring to concentrate on theoretical analysis.
- Owing to the complexity of legal theory, it is necessary to concentrate on important topics and concepts because the research may not fully capture all the subtleties and intricacies of each school of thought.

## **INTRODUCTION TO LEGAL REALISM AS A CONCEPT**

**"Law is what officials do about disputes."**

**- Karl Llewellyn**

### **(A) DEFINITION & MEANING OF LEGAL REALISM**

Legal realism offers a perspective on judicial decision-making, positing that judges do not merely adhere to legal rules but also consider the societal implications of their rulings. In contrast to legal formalism, which emphasizes strict adherence to legal rules, legal realism suggests that judges should prioritize the broader societal welfare in their decisions.

Both approaches, legal realism and legal formalism, provide frameworks for understanding and evaluating how judges make decisions, offering different lenses through which to analyse the judicial process and its outcomes.

### **(B) BROADER EXPLANATION WITH EXAMPLES**

Legal realism proposes that laws are shaped by current societal interests and public policies. Consequently, judges, according to this theory, weigh not only legal statutes but also societal concerns and public policies when rendering judgments. This stands in contrast to legal formalism, which solely emphasizes adherence to legal rules.

For instance, consider a scenario where an individual sues a company for discrimination. A judge following legal realism would factor in not only the relevant discrimination laws but also the societal views and public policies concerning discrimination. They might ponder the potential impact of their ruling on the company's reputation and how it could influence public perceptions of discrimination.

Similarly, in a case involving a person suing a hospital for medical malpractice, a legal realist judge would take into account not just the legal framework surrounding malpractice but also broader social interests and public policies regarding healthcare. They might contemplate the ramifications of their decision on the healthcare sector and public access to medical services.

These examples demonstrate how legal realism considers the wider social and policy implications of legal decisions, moving beyond a strict focus on legal statutes and regulations.<sup>9</sup>

## **(C)HISTORY & BACKGROUND FROM FORMALISM TO REALISM**

The legal realists aimed to bring law closer to its practical implications by scrutinizing the social impacts of legal rules and judicial decisions, challenging traditional legal concepts prevalent in the 19th century and the Gilded Age. This movement in legal thought embraced various perspectives and approaches. Scholars agree on the diverse nature of legal realism, acknowledging its heterogeneous character.<sup>10</sup>

Legal formalism, the predominant theoretical framework from the late 19th century to the 1930s, sought to establish legal authority by presenting law as an autonomous realm governed by neutral and universally applicable principles. Formalist legal thinkers viewed law as a cohesive system based on distinct principles, such as the exhaustive differentiation between private and public law, individualism, and adherence to legal formalism in interpretation.

Lawyers and judges following formalist principles often employed deductive reasoning, starting from abstract concepts like "property" and "contract" to resolve cases. These concepts were treated as predetermined and sufficient to determine case outcomes. The purported objectivity and neutrality of judicial decisions were thus ensured, with judges supposedly excluding personal political or moral values from their rulings. Such decisions were believed to follow logically from the judge's premises and the conceptual structure of the legal system.

However, legal realists critiqued this approach, arguing that it failed to account for the practical implications and social consequences of legal rules. They emphasized the need to consider broader societal interests and public policies in judicial decision-making. Legal realism challenged

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<sup>9</sup> <https://www.lsd.law/define/legal-realism>, (last visited, 20 March, 2024).

<sup>10</sup> The extent to which this was so, just like the extent to which laissez-faire is an accurate descriptor for the American state in the 19th and early 20th century, is disputed. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 309-310 (1995); William J. Novak, The Myth of the "Weak" American State, 113 AMER. HIST. REV. 752 (2008).

the notion of law as a rigid and autonomous system, highlighting its embeddedness in social contexts and the necessity of understanding its real-world impacts.<sup>11</sup>

## **(D) CONCEPTS UNDER LEGAL REALISM**

Legal realists rejected formalist accounts of the law, advocating for a perspective that considers the **societal implications of legal decisions**. They critiqued the notion of law as an autonomous domain governed solely by legal concepts, emphasizing the importance of understanding its real-world impacts. Figures like **Oliver Wendell Holmes** and **Roscoe Pound** highlighted the necessity of considering "**law in action**" rather than solely focusing on "**law in books**."

**Felix S. Cohen** criticized the use of legal concepts as reasons for decisions, arguing that it overlooks crucial economic, social, and ethical issues inherent in the law. Realists argued for a direct and explicit approach to addressing these issues, cautioning against neglecting them or using legalistic language to conceal ideological biases.

Different strands of legal realism emerged, including "**scientific**" and "**critical**" approaches.

**Scientific realists**, like Roscoe Pound and Jerome Frank, sought empirically grounded explanations for **judicial decision-making**, often drawing from social sciences. They believed in using empirical research to guide the law towards optimal societal outcomes, though their methodologies may seem outdated today.

**Critical realists**, such as Robert Lee Hale and Morris Cohen, challenged conventional assumptions underlying formalist jurisprudence and laissez-faire liberalism. They revealed flaws in foundational legal distinctions, questioning their legitimacy upon closer examination.

## **(E) RELEVANCE IN CURRENT JURISPRUDENCE & SCENARIO**

### **1. Social media and Free Speech**

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<sup>11</sup> *Legal Realism An LPE Reading List and Introduction*, by Samuel Aber, (<https://lpeproject.org/wp-content/uploads/2020/07/Legal-Realism-Primer.pdf>).

Legal realism prompts us to consider the social context in which laws regarding free speech on social media platforms are interpreted and applied.

**For instance**, in cases involving restrictions on online speech, judges may consider not only legal principles but also the societal implications of their rulings. This includes balancing freedom of expression with concerns about hate speech, misinformation, and online harassment.

## **2. Environmental Regulation**

Legal realism encourages policymakers to consider the real-world consequences of environmental regulations.

**For example**, in debates over climate change policy, legal realists may advocate for laws that not only comply with legal standards but also effectively address environmental degradation and promote sustainability. This approach acknowledges the interconnectedness between legal rules and broader social and environmental concerns.

## **3. Criminal Justice Reform**

Legal realism prompts a critical examination of the criminal justice system and its impact on marginalized communities.

**For instance**, in discussions about sentencing disparities or police practices, legal realists may highlight the social factors that contribute to unequal treatment under the law. This perspective underscores the importance of addressing systemic issues such as racial bias and socioeconomic inequality in legal decision-making.

## **4. Data Privacy and Technology**

Legal realism encourages a nuanced understanding of laws governing data privacy and technology.

**For example**, in cases involving digital surveillance or data breaches, judges may consider not only legal statutes but also the societal implications of technology on individual privacy rights.

This approach recognizes the evolving nature of technology and the need for legal frameworks that adapt to new challenges and developments.

## **5. Employment Law and Labor Rights**

Legal realism prompts consideration of the social and economic factors that influence employment laws and labour rights.

**For instance,** in disputes over workplace discrimination or labour practices, legal realists may advocate for laws that address power imbalances between employers and employees and promote fair treatment and equality in the workplace.

## **KEY TENETS**

### **AMERICAN REALISM**

#### **(A) American Realism as a Concept: Introduction & Background**

American legal realism, originating in the early 20th century, challenged the traditional view of law as an objective and independent system. It highlighted the influence of social, economic, and political factors on legal outcomes, rejecting the idea of fixed and impartial legal rules. Instead, legal realists advocated for analysing law in the context of its social consequences, emphasizing empirical research and a pragmatic approach.

This shift aimed to better understand the societal impact of legal rules and promote more effective and just outcomes. Despite criticism, legal realism's focus on social and contextual factors has significantly influenced legal scholarship and practice, encouraging interdisciplinary approaches that incorporate insights from sociology, psychology, and other social sciences. This broader perspective enhances the understanding of law and fosters a closer alignment between legal theory and practice.<sup>12</sup>

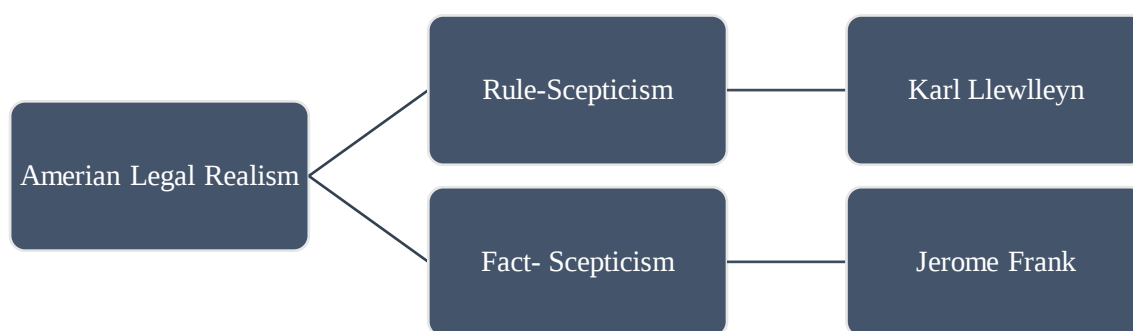
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<sup>12</sup> Rahman, M. Mushfiqur, The Core Claims of American Legal Realism and Its Implications (December 19, 2023), (<https://ssrn.com/abstract=4670104> or <http://dx.doi.org/10.2139/ssrn.4670104>).

American legal realism originated in US law schools and gained prominence during the 1920s and 1930s.<sup>13</sup> This rise coincided with a surge in case filings by the general public at the beginning of the 20th century. As a result, the number of judges within the court system increased significantly, leading to a situation where many individuals, often with limited knowledge of similar cases elsewhere in the country, were making decisions on various sets of facts. Scholars such as Felix Cohen, Herman Oliphant, Jerome Frank, and others contributed extensively to legal scholarship during this period.

Legal realists themselves argued that realism was more of an intellectual movement rather than a cohesive school of thought or set of legal theories.<sup>14</sup> However, some scholars view it as a collection of theories that have had a lasting influence on the development of legal theory. Legal realism is regarded as one of the most significant indigenous jurisprudential movements in the United States during the 20th century, impacting legal education, scholarship, and law reforms in the country.<sup>15</sup>

Despite differing views among realists, they collectively challenged several cherished ideals in American society<sup>16</sup>, including the belief that the people select the rules governing them, the notion that judicial review strengthens representative democracy, and the faith in a government of laws rather than individuals.<sup>17</sup>



<sup>13</sup> The early writings of American Legal Realism movement, although not acknowledged by the fellow realists in full, could be traced to the writings of Joseph Bingham. See “What is the Law?” Part I & II, 11 MICH. L. REV. 1 & 109 (1912).

<sup>14</sup> Suri Ratnapala, *Jurisprudence* 10 (2009) (Relying on observation of Karl Llewellyn)

<sup>15</sup> Brian Leiter, *American Legal Realism in Golding and Edmundson*, *Blackwell Guide to the Philosophy of Law and Legal Theory* 58 (2005).

<sup>16</sup> Brian Bix, *Jurisprudence Theory and Context* 189 (2009).

<sup>17</sup> <http://cyber.law.harvard.edu/bridge/LegalRealism/essay1.htm> , (last visit, 20 March, 2024).

## **Rule-Scepticism**

Rule scepticism arises from the uncertainty inherent in legal rules, which can be interpreted in multiple ways. Scholars like Karl Llewellyn highlight that legal rules often lack clarity, leaving ordinary individuals perplexed about their true meaning. According to rule sceptics, legal rules do not dictate a specific court decision; rather, judges base their rulings on their interpretation of the case's overall circumstances.

Rule sceptics primarily focus on appellate courts and their interpretations of legal rules. In essence, the outcome of a case is determined more by the judges' discretion than by the application of legal rules. Judges often reach a decision first and then employ deductive or inductive reasoning to justify it as logical and grounded in legal principles.<sup>18</sup>

## **Fact-Scepticism**

Facts scepticism, in contrast, directs attention to the lower courts, particularly trial and subordinate courts, revealing a significant discrepancy appellate courts often overlook or minimally engage with the factual details of cases. These higher courts tend to accept the facts as determined by lower courts without thorough scrutiny.

However, individuals involved at the trial level, such as police personnel, are often constrained by limitations, biases, and inefficiencies. For example, instances of police refusal to register First Information Reports (FIRs) or failure to provide copies to complainants are not uncommon. In many criminal trials, defendants are acquitted due to insufficient evidence presented by the prosecution, raising doubts about the accuracy of the facts presented.

This scenario, prevalent in diverse and vast countries like ours, underscores the scepticism surrounding factual accuracy in legal proceedings. Facts sceptics argue that when the facts underlying legal rules are flawed, justice remains elusive. Jerome Frank aptly noted the elusive nature of facts, suggesting that striving for certainty in decisions may lead to injustice.<sup>19</sup>

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<sup>18</sup> <https://ebooks.inflibnet.ac.in/lawp01/chapter/167/>, (last visit 20 March, 2024).

<sup>19</sup> Brian Leiter, American Legal Realism in Golding and Edmundson, Blackwell Guide to the Philosophy of Law and Legal Theory 58 (2005).

## **(B) Characteristics of American Realism**

- (a) Adapting to societal shifts, American Realism perceives law as dynamic and evolving.
- (b) Realists assert that judges wield authority to shape and innovate legal frameworks through their rulings.
- (c) According to Realism, the primary aim of law is to regulate and manage social interactions.
- (d) Realists advocate for thorough scrutiny of the rationale behind legal judgments and regulations.
- (e) Assessing the efficacy of legal norms heavily relies on their societal impact, which holds paramount importance.
- (f) Realism promotes the consideration and evaluation of diverse perspectives by judges in legal matters.
- (g) Given the rapid pace of societal transformations, ongoing review of legal principles becomes imperative.
- (h) Emergent societal concerns necessitate continuous re-evaluation of legal statutes for effective adaptation.
- (i) Realists recognize the inherent uncertainty of law, stressing that predictability hinges on case-specific particulars.
- (j) Pragmatic and coherent justifications for decisions are favoured over formalistic and abstract legal approaches.
- (k) Decisions should be grounded in rational reasoning rather than emotional impulses, as emphasized by Realism.
- (l) Accounting for psychological factors, American Realism influences legal rulings and human conduct.
- (m) Realism opposes the use of convoluted legal terminology due to the ambiguity it introduces into legal discourse.
- (n) Realists scrutinize not only the outcomes but also the rationales provided by judges in legal decisions.
- (o) Understanding the motivations driving legal judgments is central to grasping the essence of Realism.

- (p) Realists prioritize the practical application of legal principles over abstract or theoretical considerations.
- (q) Empirical research and sociological inquiries are employed in American Realism to grasp the pragmatic operation of laws.
- (r) Each legal case should be evaluated based on its unique circumstances and details.
- (s) Rejecting the rigidity of legal formalism, Realism favours a contextualized approach that considers societal nuances.
- (t) Specific case particulars can lead to divergent legal outcomes, even under similar legal frameworks.<sup>20</sup>

### **(C) Main Thinkers of American Realism**

**1. Oliver Wendell Holmes Jr.:** Holmes emphasized the pragmatic and empirical nature of law, famously stating that "the life of the law has not been logic; it has been experience." He believed that legal rules should adapt to changing societal needs and that judges should consider the practical consequences of their decisions.

**2. Jerome Frank:** Frank advocated for a psychological approach to understanding law, arguing that judges' decisions are influenced by subconscious factors and personal biases. He emphasized the importance of studying human behaviour and psychology in legal analysis, challenging the idea of law as purely rational and objective.

### **(D) Relevance of American Realism in Current Jurisprudence & Scenario**

- a. **Interpretation of Constitutional Rights:** American Realism's emphasis on the dynamic nature of law and judicial discretion is evident in contemporary debates surrounding constitutional rights.

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<sup>20</sup> <https://www.legalserviceindia.com/legal/article-14693-understanding-american-realism-in-jurisprudence.html#~text=American%20Realism%20in%20law%20combines,than%20how%20it%20should%20be.,> (last visited, 20 March, 2024).

For example, the interpretation of the First Amendment's free speech clause has evolved over time to address new forms of expression, such as social media. Judges' discretion in interpreting these rights reflects realist principles, as they consider societal changes and evolving norms in their decisions.

- b.       **Criminal Sentencing Reform:** In the realm of criminal justice, American Realism's focus on the societal impact of legal decisions is seen in efforts to reform sentencing laws.

For instance, the shift towards alternatives to incarceration for non-violent offenses reflects a recognition of the social consequences of harsh sentencing practices. Judges, influenced by realist perspectives, consider the practical implications of sentencing decisions on individuals and communities.

- c.       **Data Privacy and Technology Regulation:** American Realism's interdisciplinary approach is evident in debates over data privacy and technology regulation. Legal scholars and policymakers draw on insights from sociology, psychology, and technology to inform discussions on privacy laws and digital rights.

Realist principles guide efforts to balance individual privacy rights with societal interests in data security and innovation, reflecting a pragmatic and context-driven approach to legal analysis.

## **SCANDINAVIAN REALISM**

### **(A)Scandinavian Realism as a Concept: Introduction & Background**

Scandinavian Realism, also known as Nordic Legal Realism, emerged as a significant movement in legal philosophy during the early 20th century, primarily in the Scandinavian countries of Denmark, Norway, Sweden, and Finland. Rooted in the broader context of European legal

thought, Scandinavian Realism developed distinct characteristics and perspectives that challenged traditional legal theories prevalent at the time.

The movement was deeply influenced by the socio-political climate of the late 19th and early 20th centuries, marked by rapid industrialization, urbanization, and social change. Scholars and jurists in Scandinavia, like their counterparts in other parts of Europe, grappled with the complexities of modern society and sought new approaches to understanding law's role in shaping social relations and institutions.

Scandinavian Realism was characterized by a pragmatic and empirical approach to legal analysis, drawing inspiration from the natural sciences and social sciences. Unlike the formalistic and deductive reasoning prevalent in classical legal thought, Scandinavian Realists emphasized the importance of observing and analysing legal phenomena in their social context.

Key figures in Scandinavian Realism, such as Axel Hagerstrom in Sweden and Alf Ross in Denmark, challenged traditional legal positivism and formalism, arguing for a more sociological and functional understanding of law. They questioned the idea of law as a set of abstract principles and instead focused on how law operates in practice, considering its impact on individuals and society.

Moreover, Scandinavian Realism was not limited to academic discourse but also influenced legal practice and legislation in the region. The movement contributed to the development of modern legal systems in Scandinavia, characterized by a greater emphasis on legal pragmatism, social justice, and the protection of individual rights.

In summary, Scandinavian Realism emerged as a significant intellectual movement in legal philosophy, characterized by its empirical and sociological approach to understanding law. Influenced by the socio-political context of the early 20th century, Scandinavian Realism challenged traditional legal theories and contributed to the development of modern legal systems in the region.<sup>21</sup>

## **(B) Characteristics of Scandinavian Realism**

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<sup>21</sup> <https://www.elgaronline.com/edcollchap/book/9781803921822/book-part-9781803921822-41.xml>, (last visit, 20 March, 2024).

The Scandinavian realists, predominantly comprised of philosophers, differed from their American counterparts who had backgrounds in the judiciary or legal teaching.

- (a) They were labelled as empiricists, basing their approach on observation and experimentation rather than theory.
- (b) They argued that knowledge should only be derived from verifiable sensory experiences, rejecting the idea of a priori reasoning.
- (c) Their methodology centered on empirical observation to expand knowledge, viewing law as an observable phenomenon.
- (d) Legal concepts such as binding force, validity of law, and property were deemed as mere products of the imagination, lacking tangible existence beyond the mind's construct.
- (e) According to Scandinavian realism, principles or ideas lacking empirical verification were considered meaningless.
- (f) Abstract concepts like "rights" and "duties" were regarded as psychological experiences rather than objective entities.
- (g) Normativity in law, such as the binding quality and validity of legal norms, was seen as a psychological phenomenon rooted in individuals' perceptions.
- (h) Laws were perceived as existing solely on paper until the mind compelled individuals to adhere to them.<sup>22</sup>

### **(C)Main Thinkers of Scandinavian Realism**

#### **Alf Ross:**

- a) Alf Ross was a Danish legal philosopher who played a significant role in shaping Scandinavian Realism.
- b) Ross emphasized the importance of legal positivism, which asserts that the validity of law is determined by social facts rather than moral considerations.

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<sup>22</sup> <https://www.studocu.com/row/document/university-of-professional-studies/jurisprudence/scandinavian-realism-notes/15485881>, (Last visited, 20 March, 2024).

- c) He rejected the idea of natural law and argued that legal norms derive their validity from the authority of the state.
- d) Ross believed that legal rules should be analysed objectively, without reference to subjective moral judgments.
- e) He advocated for a scientific approach to law, viewing legal analysis as a social science that seeks to understand and predict legal phenomena based on empirical evidence.
- f) Ross's philosophy contributed to the development of legal realism in Scandinavia, focusing on the empirical study of law and its social context.

**Axel Hägerström:**

- a) Axel Hägerström was a Swedish philosopher known for his critical analysis of legal positivism and his contributions to Scandinavian Realism.
- b) Hägerström challenged the idea of legal norms as objective entities, arguing that they are merely expressions of subjective values and beliefs.
- c) He rejected the notion of a morally neutral law, contending that legal rules inevitably reflect the values and interests of those in power.
- d) Hägerström emphasized the importance of understanding the social and historical context in which legal norms arise, highlighting the role of power dynamics in shaping law.
- e) He criticized traditional legal positivism for failing to account for the influence of social factors on legal decision-making.
- f) Hägerström philosophy underscored the need for a more nuanced and contextual approach to legal analysis, emphasizing the subjective nature of legal norms and their connection to broader social realities.

Both Ross and Hägerström contributed significantly to the development of Scandinavian Realism, offering distinct perspectives on the nature of law and its relationship to society. Their philosophies continue to influence contemporary debates in legal theory and jurisprudence.

**(D) Relevance of Scandinavian Realism in Current Jurisprudence & Scenario**

The relevance of Scandinavian Realism in current jurisprudence and scenarios is profound, as it offers insights into understanding law's dynamic nature and its intersection with society. Here are some examples

**1. Interpretation of Human Rights Law:**

In contemporary jurisprudence, Scandinavian Realism's emphasis on understanding legal norms within their social context is evident in the interpretation of human rights law. Judges and legal scholars consider the evolving societal attitudes towards human rights issues, such as LGBTQ+ rights or refugee rights, when interpreting legal principles.

For example, in Scandinavian countries, courts have interpreted freedom of expression laws to protect marginalized groups, reflecting societal shifts towards inclusivity and diversity.

**2. Environmental Law and Sustainability:**

Scandinavian Realism's pragmatic approach to law is relevant in the field of environmental law and sustainability. Legal frameworks addressing climate change and environmental protection are shaped by societal concerns and scientific evidence.

For instance, Scandinavian countries have adopted legislation promoting renewable energy sources and sustainable development, reflecting a realist understanding of the need to address environmental challenges within legal frameworks.

**3. Criminal Justice Reform:**

In the context of criminal justice reform, Scandinavian Realism's focus on empirical observation and social context informs discussions on sentencing policies and rehabilitation programs. Scandinavian countries have implemented progressive reforms, such as restorative justice initiatives and alternative sentencing options, reflecting a realist perspective on the effectiveness of legal interventions in addressing underlying social issues.

For example, Norway's emphasis on rehabilitation over punishment in its prison system aligns with realist principles of addressing the root causes of crime.

In these examples, Scandinavian Realism's emphasis on understanding law's practical implications and its responsiveness to societal changes is evident. By considering the broader

social context and empirical evidence, contemporary jurisprudence can better address complex legal issues and promote justice and social welfare.

## **SIMILARITIES BETWEEN AMERICAN REALISM AND SCANDINAVIAN REALISM**

1) **Empirical Approach:** Both American and Scandinavian Realism emphasize the importance of empirical observation and analysis in understanding the law's functioning. They both prioritize studying legal phenomena in their social context rather than relying solely on abstract principles.

Example: In both contexts, legal scholars and practitioners conduct empirical research to analyze the impact of legal rules on society. For instance, studies examining the effectiveness of criminal justice reforms or the implementation of environmental regulations reflect the realist approach to understanding law's practical implications.

2) **Critique of Formalism:** Both American and Scandinavian Realism critique traditional formalistic approaches to law, which prioritize abstract legal principles over real-world consequences. They argue that legal rules should be interpreted and applied in light of their social context and practical effects.

Example: Realists in both contexts challenge the notion of legal formalism in court decisions, advocating for judges to consider societal implications and individual circumstances when applying legal rules. For example, in family law cases, courts may consider the best interests of the child rather than rigid legal principles.

3) **Interdisciplinary Perspective:** Both American and Scandinavian Realism encourage interdisciplinary approaches to legal analysis, drawing insights from fields such as sociology, psychology, and economics. They recognize that law is influenced by various social, economic, and psychological factors.

Example: Legal scholars in both contexts collaborate with experts from other disciplines to study complex legal issues. For instance, in cases involving intellectual property rights, economists may provide insights into the economic impact of different legal interpretations.

4) **Focus on Social Justice:** Both American and Scandinavian Realism prioritize social justice and equity in legal decision-making. They advocate for laws and legal practices that promote fairness and equality, particularly for marginalized groups.

Example: Realists in both contexts may critique discriminatory practices in the criminal justice system and advocate for reforms to address systemic inequalities. For instance, they may support initiatives to reduce racial disparities in sentencing or improve access to legal representation for low-income individuals.

5) **Scepticism of Legal Formalism:** Both American and Scandinavian Realism are sceptical of the idea that legal rules and principles are inherently objective and neutral. They argue that legal decisions are influenced by subjective factors and societal values, rather than purely logical or deductive reasoning.

Example: Realists in both contexts may critique judicial decisions that rely solely on legal precedent without considering changing societal norms or evolving understandings of justice. For example, they may challenge decisions upholding discriminatory laws based on outdated social attitudes.

6) **Emphasis on Legal Realism as an Intellectual Movement:** Both American and Scandinavian Realism view legal realism as an intellectual movement rather than a unified school of thought with fixed principles. They recognize the diversity of perspectives within the realist tradition.

Example: Legal scholars in both contexts may engage in debates and discussions about the nature and scope of legal realism, recognizing the plurality of viewpoints within the movement. For instance, they may explore different realist theories and their implications for legal practice.

7) **Critical Engagement with Legal Theory:** Both American and Scandinavian Realism engage critically with traditional legal theories, including legal positivism and natural law theory.

They challenge the notion that law is inherently rational and objective, emphasizing its contingent and context-dependent nature.

Example: Realists in both contexts may critique legal theorists who posit law as a purely rational and rule-based system, arguing that such theories fail to account for the complexities of legal practice and the diversity of human experiences.

8) **Influence on Legal Education and Scholarship:** Both American and Scandinavian Realism have had a significant impact on legal education and scholarship, shaping debates and discussions about the nature of law and legal practice. They have inspired generations of legal scholars to adopt a more critical and interdisciplinary approach to studying law.

Example: Law schools in both contexts may offer courses or seminars on legal realism, exploring its historical development and contemporary relevance. Legal scholars may publish research articles and books that draw on realist insights to analyze current legal issues and trends

## **DIFFERENCES BETWEEN AMERICAN REALISM AND SCANDINAVIAN REALISM**

Differences between American Realism and Scandinavian Realism are:

### **ORIGINS AND INFLUENCES**

American Realism originated primarily in the United States during the early 20th century, driven by legal scholars and practitioners like Felix Cohen and Jerome Frank. It was influenced by the social, economic, and political factors prevalent in American society at the time.

Scandinavian Realism, also known as Nordic Legal Realism, emerged in Scandinavian countries such as Denmark, Norway, Sweden, and Finland during the same period. It was characterized by philosophers like Alf Ross and Axel Hägerström and was influenced by the broader European legal thought.

## **PRACTITIONERS' BACKGROUNDS**

American Realism was predominantly led by legal scholars and practitioners with backgrounds in the judiciary or legal teaching, such as Felix Cohen and Jerome Frank.

Scandinavian Realism was primarily comprised of philosophers who approached legal analysis from an empirical and experimental perspective, including Alf Ross and Axel Hägerström.

## **EPISTEMOLOGICAL APPROACH**

American Realism emphasized the importance of empirical research and pragmatic analysis in understanding law, focusing on the societal impact of legal rules and judicial decisions.

Scandinavian Realism, labeled as empiricist, prioritized observation and experimentation over theoretical reasoning. It rejected a priori reasoning and sought knowledge derived from verifiable sensory experiences.

## **VIEW ON LEGAL NORMS**

American Realism challenged the idea of fixed and impartial legal rules, advocating for a dynamic and evolving approach to law based on societal needs and consequences.

Scandinavian Realism questioned the objective existence of legal norms, viewing them as psychological phenomena rooted in individuals' perceptions rather than as tangible entities.

## **INFLUENCE ON LEGAL PRACTICE**

American Realism significantly impacted legal education, scholarship, and law reforms in the United States, encouraging interdisciplinary approaches and a closer alignment between legal theory and practice.

Scandinavian Realism influenced legal practice and legislation in Scandinavian countries, contributing to the development of modern legal systems characterized by a greater emphasis on legal pragmatism, social justice, and individual rights protection.

## **INTERDISCIPLINARY EMPHASIS**

American Realism incorporated insights from sociology, psychology, and other social sciences to analyze law's social consequences and practical implications.

Scandinavian Realism drew inspiration from the natural sciences and social sciences but focused more on empirical observation and analysis within the legal context.

These differences highlight the distinct philosophical underpinnings and socio-cultural contexts that shaped American Realism and Scandinavian Realism, despite their shared emphasis on empirical analysis and societal impact in legal theory.

## **CONCLUSION**

In conclusion, the comparative analysis of American Realism and Scandinavian Realism offers valuable insights into the diverse philosophical perspectives that have shaped legal theory and practice in different contexts. While both movements emerged during the early 20th century and shared some common themes, such as the emphasis on empirical analysis and the rejection of rigid legal formalism, they diverged significantly in their origins, epistemological approaches, and influence on legal systems.

American Realism, originating primarily in the United States, was led by legal scholars and practitioners who sought to challenge traditional views of law as an objective and independent system. Instead, they emphasized the dynamic and evolving nature of law, highlighting its societal consequences and advocating for a pragmatic approach to legal analysis. American Realists like Felix Cohen and Jerome Frank played a crucial role in reshaping legal scholarship and education in the United States, encouraging interdisciplinary approaches and a closer alignment between legal theory and practice.

On the other hand, Scandinavian Realism, emerging in Scandinavian countries like Denmark, Norway, Sweden, and Finland, was characterized by philosophers who approached legal analysis from an empiricist perspective. They prioritized observation and experimentation over theoretical reasoning, questioning the objective existence of legal norms and emphasizing the subjective nature of legal phenomena. Figures like Alf Ross and Axel Hägerström contributed

significantly to the development of modern legal systems in Scandinavia, characterized by a greater emphasis on legal pragmatism, social justice, and individual rights protection.

Despite their differences, both American Realism and Scandinavian Realism continue to influence contemporary debates in legal theory and jurisprudence. Their emphasis on understanding law within its social context, the importance of empirical analysis, and the need for a dynamic approach to legal interpretation remain relevant in addressing complex legal issues and promoting justice and social welfare in modern societies.