
ADVANCING LEGAL CONSCIOUSNESS IN SOUTH AFRICA: USING LAW AS AN INSTRUMENT OF SOCIAL CHANGE

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Abstract: *The article argues that there is a dire need in South Africa to build a legally conscious society where the layperson can understand and insist on their legal rights, whilst also respecting the rights of others. Despite South Africa, being a beautiful country and a popular tourist destination, a large percentage of people live in rural areas, largely uneducated, and living in poverty, with limited legal awareness and resources. The lack of access to private legal practitioners and justice are barriers to protecting human rights, despite a well-intended Constitution. With the high level of crime in the country, coupled with poverty and exorbitant legal costs, the need to assist the disadvantaged, and create a legally conscious society, has never been greater. This article will seek to explore creative ways in which the common citizen can become legally proficient and protected, without a total reliance on the traditional legal bodies and processes. It will be argued that adopting a legal realist approach, together with counter-hegemonic practices, can assist in transforming a one-dimensional legal system into one that is legally conscious, people-focused, and interactive.*

Key Words: Hegemony, Legal consciousness, Legal ideology, Legal philosophy, Legal realism

Research Area: Law and Social Science

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1. INTRODUCTION

Law pervades all facets of life, and should be seen as a tool that can aid in the betterment of society. It should, therefore, be studied as an insignia of knowledge that permeates the “real” world, and one that is used as an instrument of social change (Kessler 1995). A need exists in South Africa for legal education to take the lead in bringing about social change. A symbiotic relationship between law and society, where each affects the other in a positive way, is crucial to building a vibrant and legally conscious society, which is measured in terms of how law is understood, interpreted and applied (Harrington and Merry 1988). However, in South Africa, with a population of close to fifty million people, of which probably fifty percent live in rural areas, with limited legal awareness, and lack of resources amongst the poor, the lack of access to private legal practitioners and justice are barriers to protecting human rights, despite a well-intended Bill of Rights and Constitution (Holness 2013). With the high level of crime in the country, coupled with poverty and exorbitant legal costs, the need to assist the disadvantaged and create a legally conscious society has never been greater. As Wachtler said, “A system of justice that closes the door to those who cannot pay is not deserving of its name” (1991).

There is a great need for law to be used as an instrument of social change, and legal practitioners, scholars, activists and institutions of learning all have a vital role to play in advancing social justice and creating a legally conscious society. All law schools should focus on the sociological aspect of law, which is founded on three claims that are closely

interwoven: law must be understood as a social phenomenon, law constitutes one aspect of social control, and that a mere analysis of legal concepts is insufficient to explain “law in use” (Wacks 2005). The changing South African setting, characterized by gaps in legislation, fluctuating social needs, and scientific expansion, has presented the ideal platform for creativity and consciousness (Summers 1985). It is important that lawyers, law-making bodies, and even the layperson, see law as more than merely a system of rules that can be applied mechanically in order to achieve an outcome (Duxbury 1991). As an ever-evolving product of “social construction”, law must be seen for the practical function that it serves in society (Omogbe 2004). Within the domain of the legal profession in general, there is a degree of ignorance about the efficacy of being able to “combine astute legal analysis with an awareness of social conditions” which may be the key to improving not only young legal minds, but society in general (Goldberg 2010). The need to socially transform and replace the declining interest in the law in South Africa with a deep-rooted respect for legal culture and the rule of law has never been greater (Hodgson 2015). Empowering society with the knowledge of basic legal rights is crucial to closing the gap between the people and the law, and building a legally conscious society will contribute to the attainment of justice and social equality in South Africa (Hodgson 2015). The challenge that most societies face, not least South Africa, is how to develop a legally conscious society that knows and understands the language and structure of power (Ewick and Silbey 1998). This article seeks to examine how a change in values, philosophies and structures can undertake advancing legal consciousness in South Africa. In this regard, the article will seek to explore creative ways in which the common citizen can become legally proficient and protected without total reliance on the traditional legal bodies and processes. It will be argued that adopting a legal realist approach, together with counter-hegemonic practices, can assist in breaking down impediments to legal consciousness, as well as challenging dominant ideologies, and transforming a one-dimensional legal system into one that is people-focused and interactive.

2. MOVING AWAY FROM THE TRADITIONAL APPROACH: LEGAL REALISM

According to Wizner (1988), law has traditionally been viewed as the sole instrument of legal control, devoid of any consideration for social issues and community values. The lawyer-centric approach, understandably developed during the colonial and apartheid past of South Africa, has created a dearth of knowledge about legal rights, and the rule of law in general (Hodgson 2015). In recent times, a gradual awareness has emerged that law is not just a lawyer’s tool, but an important component of society, which cannot be isolated from social facets (Cotterrell 1984). In this article, it will be debated that the ability to view law as more than an instrument of legal control is essential to building a legally conscious society – one that is concerned with real-life outcomes, that can ultimately lead to societal transformation and legal fulfilment (Anleu 2010). In this regard, there is a need for inward reflection by members of the legal profession, and as a starting point, law students should be taught that their role goes beyond just practicing the law. In order to bring about social change and

transform society, law schools and students need to move beyond the traditional 'black and white' approach to viewing, studying and applying the law. To this effect, legal realism is essential to supporting a transformative South Africa, where concepts such as social justice and consciousness are explored and engaged with regularly.

Legal realism is a revolutionary theory which opposes the traditional approach to law (Wilkins 1990). The key tenet of legal realism is that man-made law is subject to change and evolution (Duxbury 1991). The roots of legal realism lie in the idealistic, sociological-positivist approach of Roscoe Pound, who stressed the importance of distinguishing between "law set forth in books" and "law in action" (Pound 1910). As long as a century ago, men like James Carter, who was a famous nineteenth century forbearer, believed that the law must be "adapted to human affairs" in order to attain and maintain justice rather than seek uniformity (Carter 1890). This liberal view of law was seen as a direct threat to the traditional or formalistic approach, but despite resistance towards the new order, the realistic view of law continued to grow and gain credence (Jackson 1968). Another key figure who influenced the realist movement was Justice Holmes, who was widely regarded as the founder of American legal realism (Gilmore 1961). Holmes saw law as a catalyst to achieving social and societal goals.

Legal realists believe that law is not restricted to factors within the legal domain, but it is linked to real-life outcomes and social factors that influence the law and legal decisions (Cotterrell 1984). They believe that law is more than just abstract concepts found in legal textbooks. Realists view law for the practical function that it serves in society (Omoregbe 2004). Realism moves beyond the single path of logic, and focuses on social factors that speak to the legitimacy of law and the sociological investigation into the sciences (Cotterrell 1984). The inquiry into the social factors that make law has created the opportunity to explore behavior, beliefs and realities (Hosten 1983). Realism has forged a therapeutic link between law and other disciplines, and to a large degree can be attributed to identifying and addressing the gaps in the purely formalistic legal system of the past (Wilkins 1990). The approach of realists is to search for "real factors" in legal outcomes, and this has enabled them to challenge the objectivity and consistency of legal rules (Hosten 1983). Understanding legal realism and adopting a legal realist approach is crucial to transforming the current legal culture into one that views ordinary people as important agents in a transformative legal system.

Courts have a huge role to play in bridging the gap between people and the law. Recent court decisions show a shift away from formalism towards a realist approach, where the socio-economic impacts of legal decisions are being highlighted. A typical example is case of *Prince v President of the Law Society of the Cape and others* 2002 2 SA 794 (CC), where the Constitutional Court had to decide on the issue of freedom of religion. Prince applied to the Law Society to have his contract for articles registered. In his application, he disclosed that he had two previous convictions for possession of cannabis and that as a Rastafarian, he would continue to use cannabis as it was part and parcel of his culture and religion. The majority court emphasized that the main issue in the matter was whether the law

was inconsistent with the Constitution. It became clear that the judges in their majority were hesitant to go outside the text, and they adopted a positivistic approach when arriving at their decision. However, Justice Sachs in his minority judgment remarked:

“...because they are politically powerless and unable to secure their position by means of a legislative exemption, the Rastafari are compelled to litigate to invoke their constitutional rights. They experience life as a marginalized group seen to dress and behave strangely, living on the outer reaches rather than in the mainstream of public life. The court has accepted that: ‘to understand the other one must try, as far as is humanly possible, to place oneself in the position of the other.’ An inflexible application of the law that compels him to choose between his conscience and career threatens to impoverish not only himself but all of South Africa and to dilute its burgeoning vision of an open democracy.”

Justice Sachs clearly recognized the need for judges and the current legal system to move beyond the text. He identified the fact that Rastafarians were powerless when pushing to have their views aired in the political arena. The judgment highlights the popular belief that politics, social circumstances and policy considerations can and should play a role in the decision of courts in South Africa. This case has emphasized the fact that legal education is being transformed by a growing awareness that law, as an important aspect of society, cannot be isolated from social phenomena (Darby and Cotterell 1994).

A realistic approach to law is crucial in the sense that it stimulates a critical understanding of the law (Dias 1985). The understanding that law is more than a set of rules is the starting point for any law student, layperson, or attorney in developing a cultured set of ‘tools’ to solve and deal with legal issues in the ‘real’ world (De Groot 1998).

Despite criticism levelled at realism and realists over the years, such as the over-reliance on the ‘human factor’ in the judicial decision-making process, and the failure to adhere to formal structures and rules, there is no doubt that realism has encouraged critical thinking and problem-solving in legal education (Hosten 1983). It is this critical thinking and common-sense understanding of the legal system, and the world, that can be crucial in creating a legally conscious society. The construct of consciousness becomes clearer when one adopts a realist approach to understanding and interpreting the law.

3. THE CONCEPT OF LEGAL CONSCIOUSNESS

The ability to shape the law, make meaningful legal decisions, understand one’s rights, and participate fully in the legal system is possible if society is able to know and understand its rights. Building a legally conscious society is necessary in order to bridge the gap between people and the law in South Africa. There is a growing body of literature on legal consciousness, and it is important to understand this crucial concept in an effort to inwardly reflect on what is needed in order to build towards such a society. Legal consciousness is a theoretical concept, and a topic of empirical research, developed among

socio-legal scholars to explain how law sustains its institutional power across wide spans of time, space, and variable performance (Silbey 2008). It is also viewed as the aspect of law that is concerned with how the ideas, representations, and actions of lay-people in society help to sustain legality's presence as a dimension of social life (Ewick and Silbey 1998; Silbey 2005). The concept is crucial to how mature a country is viewed in terms of democracy, peace building, and national development, and the term is intended to suggest some parallels between the institution of the law, and a system of language to be mastered and understood (Kaugia 1996). In a recent study, Bieliauskaite and Slapkauskas (2015) defined legal consciousness as a manifestation and product of the development of the rule of law. It has been described further in terms of (1) the attitude of people to the law as a universally important value, (2) the impact on legislation, and (3) the necessary condition of precise and diligent law implementation (Bieliauskaite and Slapkauskas 2015). Legal consciousness is said to become essential when society experiences reforms and radical changes in the system of values, content, and forms of public life. Legal consciousness has also been described as "the unit of objectively existing images, ideas, emotions and theories, which expresses the attitude of society, groups and individuals towards law as a social institution, the legal system and its elements" (Bieliauskaite and Slapkauskas 2015).

Moreover, legal consciousness involves two structural elements, namely, legal psychology and legal ideology (Bieliauskaite and Slapkauskas 2015). While legal psychology relates to the feelings a person experiences when he or she is confronted with legislative and law enforcement activities of varying social structures, it also relates to a person's feelings when an assessment is made about the extent to which justice and personal interests are considered. Vaisvila (2000) viewed legal consciousness as consisting of feelings, such as the sense of justice, emotions, habits, moods and stereotypes, resulting from people's trust or distrust in the governance and legal system, and processes such as rulings of the courts of justice. Alternatively, legal ideology refers to the system of legal ideas, theories and approaches through which people know the existing law, assess legal reality, and express the desired law (Bieliauskaite and Slapkauskas, 2015). Contrary to legal psychology, legal ideology mainly focuses on law.

Accordingly, legal consciousness can be referred to as the expression of ideas and behavioral attitudes of people towards the legal system of a society and a country at large. Essentially, the customs, experiences, and feelings of people, in relation to legal phenomena, constitute the psychological aspect of legal consciousness, and among these are a sense of justice and a loathing of crimes and illegal actions (Merry 1990). The dynamic nature of legal consciousness is reflected by the fact that not only do external factors, such as the court system, law-making bodies and law enforcement amongst other aspects, establish legal consciousness, but internally learned experiences and processes play a huge role in developing specific legal consciousness (Silbey 1992). Legal consciousness studies have shown that law provides the framework for citizens to construct meaning to their experiences in daily life, and it is how people perceive the rule of law and justice that impacts on the promotion of human rights and development in a cohesive society (Marshall and Barclay 2003). An understanding of the words used in a legal context is crucial for the layperson to be

able to interpret the law and draw conclusions (Canadian Bar Association 1992). Educating people about the way they understand and think about the law is crucial to creating consciousness about the law. In this manner, education is a process of teaching and learning, which product must be seen in the behavioral change of the people being given such exposure (legal education). The Multiple Action Research Group (working for the promotion of legal awareness) defined legal consciousness as "critical knowledge of legal provisions and processes, coupled with the skills to use this knowledge to respect and realize rights and entitlements". Therefore, legal education (consciousness) should not be solely theoretical, but should blend with the practical aspect also, simply because the education of the legal consciousness must be seen practically and not as mere paper work. Further, Bilder (1999) defined legal literacy as a "spectrum of functional skills", relating to the legal system and conduct of lawsuits. Thus, a certain degree of legal literacy is required for effective participation in modern society. However, it is not necessary for the average citizen to reach the professional standard of thinking and writing like a lawyer. However, the lawyer who is professionally trained in law has a crucial role to play in advancing legal consciousness, and this can only be achieved if they are made to see beyond the traditional approach to law.

It is not just the lawyer who plays a role in advancing legal consciousness. The layperson has a crucial role to play in assigning meaning to social structures, and how they understand and use the law is crucial to the legality construction process (Larson 2004). A knowledgeable or legally conscious population is likely to conduct itself in a manner that constructs legality, seeks solutions, minimizes conflicts, and engages in conflict prevention strategies (Ewick and Silbey 1998). Moreover, increased public awareness about the law and legal system strengthens public confidence and trust in the law-making bodies, the court system, law enforcement, and the judicial system as a whole. A legally conscious society will view the legal system as one that is for their comprehensive benefit, and active participation in the legal system will lead to a better and happier society. This has immense benefits in terms of raising citizenry values and building a rationalistic society. However, in order to achieve this goal, it is imperative that the barriers that have slowed down the process of advancing public awareness about the legal system in South Africa are decimated.

4. BARRIERS TO LEGAL CONSCIOUSNESS

4.1 Hegemony

In South Africa, despite the existence of a well-respected Constitution, there still exists antipathy towards the law and the courts, as access to courts remains a fantasy for the poor (Hodgson 2015). The business of lawyering in a commercial sense, the overly technicality of law to the lay person, the general negative perception of lawyers and the legal profession, as well as the distrust of state machinery are key factors that have created a division between ordinary people and the law (Hodgson 2015). The court system in South Africa is seen by the poor as being highly colonized and institutions of bourgeois rule, with many people firmly believing that the law only works for the capitalist class and not the poor (Mdlalose 2012). A hegemonic South African legal system is generally seen to go against the

constitutional imperative of access to justice. In searching for a legal system that serves all, it becomes imperative to understand the concept of hegemony and find ways to empower all groups, especially including those who are perceived as inferior.

Hegemony describes how a social group is controlled by means of domination, physical force or submission (Litowitz 2000). According to Litowitz (2000), any form of dissent is restrained through social institutions or a hierarchical structure, and hegemony serves to instill a sense of inferiority in subordinated groups. In a legal context, the legal system promotes hegemony by routing various forms of individual conflict into an authoritarian public setting, such as a court of law, which tends to remove such cases from their social context (Gabel and Harris 1982). The social order is also legitimized through legal reasoning, which tends to reinforce existing hierarchical power relations (Gabel and Harris 1982). Courts and the judiciary are seen to be the enforcer of legal norms; yet most legal conflicts do not reach or enter this forum. Fortunately, hegemony can be challenged through counter-hegemonic practices or consciousness, such as client empowerment and organizing (Ewick and Selby 1998). It has often been said that the legal system tends to aid the wealthy, as the poor cannot afford to take their cases to court, and legal aid does not cover all types of cases, and all classes of litigants. For this very reason, the need to prioritize a counter-hegemonic system, which seeks to prevent the elite from perpetuating their power, wealth, and status, is crucial to providing access to justice to all citizens. A counter-hegemonic system, where structural relationships between the legal profession, courts, communities, and programmes seeking to promote independence and accountability, is crucial to raising legal consciousness and achieving social justice (MacDowell 2015).

4.2 The ability of education to promote social progress

The field of education is central to promote social progress, but this is largely dependent on the quality of the education system. John Dewey, America's most influential philosopher of education, stated that, "through education, society can formulate its own purposes, can organize its own means and resources, and thus shape itself with definiteness and economy in the direction in which it wishes to moves" (Dewey 1966).

According to the World Education Forum, in Dakar, Senegal (2000), if all students in low income countries could leave school with basic reading skills, about one hundred and seventy-one million people could be lifted out of poverty. This statistic shows that education is the means of living (life), which amounts to far more than just reading, writing, and arithmetic. It is one of the most important investments a country can make in its people and its future, and it is therefore critical in reducing inequality, and resolving conflict in every society.

Thus, the role of education (higher level education particularly) involves passing on societal culture, norms and values (including the law), which should be measured by the change in values of learners who have undergone such training. In essence, legal education is supposed to play the same role. Legal education can be seen as a form of practical training that provides interpretations of the rule of law to the general public, thereby cultivating a greater understanding of the law. Justice in a country, as a whole, will be better promoted by

knowing the rules and regulations governing a society. The education sector in South Africa should take interest in working to raise a legally conscious South African population. It has been suggested that there is an urgent need in South Africa for law schools to produce graduates who are committed to social transformation, and have the capacity to be accountable and responsible in a professional and social context (Klare 1998). Law schools have a responsibility to transform legal education, and move towards a legal order that contributes to the betterment of society (Fourie 2016). It is clear that people in the legal profession, and indeed the whole nation, stand to benefit from a strong legal profession that contributes to a legally literate community.

Leonard J. Long, Professor of Law, at the Quinnipiac University School of Law, highlighted the significance of legal literacy in the United States' legal education by stating that, "law students, law firms, consumers of legal services, and society as a whole would benefit from having a legal profession comprising of and dominated by people who are literate in American law, its history, and its jurisprudence." (Long 2009). Unfortunately, Professor Long lamented that legal literacy is not promoted, mainly due to the fact that it is not viewed as necessary for the practice of law, thereby contributing to the anti-intellectual tradition in American law generally. This problem that has been identified in relation to America, also exists in South Africa, and many other countries around the world. The question relating to how the higher education institution sector, as well as professional legal associations, can support government initiatives to raise legal consciousness among the South African people has been strongly debated recently. The basis of this concern is the fact that a lack of knowledge of the rules gives advantage to the those who are knowledgeable and informed. Enhanced legal literacy among the populace can serve to empower ordinary citizens to insist on their rights and protect themselves against exploitation. It is common knowledge that people in the legal profession at times engage in unethical behavior. In many situations, people in the legal profession engage in fraudulent acts against the very people they have undertaken to protect their rights and fight their cases. A legally literate population will resist such frauds, and can serve as a strong antidote to such exploitations, which could then improve the functioning of government, and also private institutions in the country. A legally literate and conscious population can also lead to enhanced standards and the well-being of the citizens, as well as the proper functioning of businesses and civic culture. The higher education sector needs to recognise the need to equip the general population with legal consciousness. While educating people is important, emphasizing and raising the legal consciousness or literacy of the masses is a key aspect that has been neglected. The idea that people are capable of learning throughout life, and that they should be encouraged to do so is a notion that applies equally to legal consciousness (Kyrasek and Polisensky 1968). Of course, such education may not be a profitable activity for most people in the legal profession, and may even be regarded as a project for the government, but the more legal literacy and legal consciousness education eludes the higher education sector, the less education impacts positively on societies.

4.3 Lack of psychosocial training in assertiveness and self-esteem

In many developing countries, such as Jordan, there exist many barriers for women accessing the justice systems, such as psychological, cultural and financial barriers (Arab Council for Judicial and Legal Studies 2007). Many legal awareness sessions tend to focus on information provision, rather than information use, and campaigns tend to devote insufficient time to addressing underlying factors as to why women do not access legal frameworks (Al-Badayneh 2012). In many developing countries, cultural aspects play a crucial role, where commitment to families is strong and problems are viewed as internal family matters. South Africa is no different. Outside structures are often viewed with disdain, and violence against women is seen as personal and family issues rather than legal problems, especially in male dominant cultures (Btoush 2008). Women are hesitant to report abuse due to feelings of shame, depression, and fear of intimidation, and those who are brave enough to do so, are stigmatized, socially ostracized, and seen as rebelling against their families (Haj-Yahia 2002). Legal awareness and empowerment programmes are crucial for equipping women with information about their constitutional rights, as well as providing them with the tools to advance their social conditions. However, coupled with awareness programmes, the need for psychosocial support and basic assertiveness skills training, that enable women to receive and decode the information they have received into action is most important (Arab Council for Judicial and Legal Studies 2007). It is hoped that such training will, over an extended period, promote legal consciousness amongst women, as well as erase generations of human rights' violations and disempowerment.

5. THE WAY FORWARD

5.1 Legal education and schools

There have been many cases where governments have promoted long-term legal literacy missions or awareness campaigns. An example of this is when institutions arrange legal literacy events. Legal awareness can also be achieved through camps, lectures, and interactive workshops, or 'crash' programs on the essential and elementary legal laws. Among the general public, many are willing to spend time listening to scholars on contemporary issues that have significant bearings on the rights and livelihoods of ordinary people. Strategically located display boards in public places (railway stations, bus stations, market places, in front of major government offices and police stations) can be used to help government officials, police, and the public to understand the spirit of law.

Children are fundamental to socio-economic sustainability. Raising the legal consciousness of children is a worthy choice that will guarantee a legally conscious adult population, who understand and insist on their rights, while respecting the rights of others in the future. It is therefore suggested that a legal and civic education course be made compulsory in all schools until grade ten, similar to that of the subject of South Africa history that is taught in schools. The course should instill in children the culture of valuing human rights, respecting life and property, and living in harmony with people of different cultures and beliefs. The government should play a facilitating role by ensuring the development of an appropriate curriculum and texts to promote quality and standards.

Furthermore, the establishment of a program that ensures the transfer of new legal research from the higher educational institutions (HEIs) to the public, as and when they emerge, would serve as an important dimension in raising legal literacy. The notion of research and engagement in higher education is thus an important agent in promoting access to justice, and creating a legally conscious population in South Africa. The dissemination of accurate and reliable legal information is not only crucial to creating new knowledge and updating existing knowledge, but also relevant to all legislative processes. Research can make massive contributions to all communities, and play an important part in addressing social, cultural, and economic issues and problems South Africa. HEIs, through research, can ensure that societal issues, such as legal rights, children and women abuse, as well as other socio-economic issues, become the focal point in the country. In particular, research undertaken by postgraduate students should highlight legal issues that are current, topical and pertinent to the society. Importantly, the findings from such studies must be available and accessible to the general public, most especially through social media and other platforms easily accessible to the people.

5.2 Law schools

Law schools have a responsibility to impress upon law students that law is not just about financial gain and court battles, but that law can be used as an instrument to better society and bring about social change. Law teachers need to ensure that law students view law as part of the fabric of society, and this can be achieved by instilling values in them that engage the Constitution, shape a new legal order, and ultimately lead to social change (Fourie 2016). There is an urgent need to ensure that law curricula focus on social responsibilities and constitutional values, and thus a transformative legal education framework is crucial to the transformation of a new legal order (Quinot 2012). Fourie (2016) suggested adopting a therapeutic jurisprudence approach when attempting to transform legal education, and the benefits of such an interdisciplinary approach to studying law's impact on emotional life, and psychological well-being, is that it tends to support key values of humaneness, social justice and fairness. There is no doubt that there are benefits to such an approach, as law can be studied as a potential therapeutic agent that can promote legal consciousness and constitutional democracy.

5.3 Psychosocial training in assertiveness and self-esteem skills

The United Nations has expressly stated that, "access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflict" (Arab Council for Judicial Legal Studies, White Paper of Access to Justice and Legal Aid in the Arab World 2007). Violence amongst women in the world continues to escalate, and research suggests that as high as fifty percent of women in the world are experiencing, or have experienced, some form of violence in their lives (Kumar and Supriti 2013). As indicated earlier, women are hesitant to report abuse due to feelings of shame, depression and fear of intimidation, and those who are courageous enough to do so, are often denounced, socially detested and seen as defiant by their families (Haj-Yahia 2002). Psychological, cultural and financial barriers can be overcome with legal awareness and empowerment programmes.

However, awareness programmes on their own may not be sufficient to erase generations of human rights violations, but such programmes, coupled with psychosocial support and basic assertiveness skills training, can successively assist women to overcome their mental trauma, and make practical use of their knowledge of legal rights (Arab Council for Judicial and Legal Studies 2007).

5.4 Counter-hegemonic practices

The notion that law ‘only works for the rich’, and is repressive towards the poor, needs to vanish in order for South Africa to build a legally conscious society. Courts, for example, are reliant on the State to support and uphold its decisions, and reinforce its independence and legitimacy, yet quite often they come under attack by politicians or high-ranking officials who question its independence. Any form of mistrust in the justice system can have a detrimental effect on its legitimacy. Those who are wealthy or have influence are generally seen to navigate the justice system easily, using their means to afford bail, invest in their own private investigators, and appoint the best legal representatives. In contrast, the poor are sometimes denied bail on frivolous grounds, or cannot afford bail and are then forced to await their trial behind bars. Many cannot afford their own legal representatives, and are appointed state-funded or legal aid attorneys who are often overworked. Legal Aid South Africa does provide legal assistance in all courts in South Africa, but their services are restricted in respect of civil justice, and further limited to those who fail their means test. Countries such as Brazil and India with large populations have engaged institutionally with providing legal assistance to the poor by codifying free services to the poor as an obligation (Klaaren 2014).

Court judgments at times fail to facilitate “public dialogue” as many are lengthy, complex, and not readily accessible to the disadvantaged. There is an urgent need to dismantle hegemonic power in the South African legal system. The need to prioritize a counter-hegemonic system, which seeks to prevent the elites from perpetuating their power, wealth, and status, is crucial to providing access to justice to all citizens. Awareness programs, highlighting client empowerment, and stakeholder relations, are crucial to eradicating hostility when poor people access the law. Taking the law and the courts to the people and especially the rural areas of South Africa can make a difference. There may be a need to change the structure of some of the courts, and create more user-friendly courts which do not require legal representation, increase the number of village or community courts, and focus more attention on alternative dispute resolution mechanisms (McQuoid-Mason 1999). A counter-hegemonic system that promotes a synergetic relationship between all legal role-players is crucial to raising legal consciousness (MacDowell 2015).

5.5 Street law and legal clinics

Street Law is a legal education program that takes law to the schools and the street, and provides people with an understanding of how the legal system works (McQuoid-Mason 1999). Street Law fundamentally aims at making people aware of their legal rights, and how the legal system can be used to protect them. Stated differently, the core aims of Street Law education is to bring awareness of civil rights, democratic principles, conflict resolution, the

advocacy process, criminal and civil law, employment law, family law, and consumer rights. The overall goal is to ensure that legal literacy facilitates national development. Essentially, through street law, the public can become conscious of their rights, duties, and responsibilities. Legal consciousness would be further enhanced if most South African universities decide to adopt schools across the countries, and educate them on constitutional freedom, social justice, and responsibility. In fact, the street law education approach to enhancing legal consciousness is not limited to students, but can, and should, be extended to all persons outside of the legal profession (such as educators, police and security officers, youth groups, churches, workers, businesses, and many others who will benefit).

Currently, law clinics exist almost in most law faculties and schools in South Africa. While most of the law clinics are operated using contract staff, they do play an important role in providing legal support to communities, as well as crucial training and practical skills for senior law students (McQuoid-Mason 1982; McQuoid-Mason 2007; McQuoid-Mason et al. 2010). Essentially, the university-based legal aid clinics supplement the role of national legal bodies. Although most clinics deal with an array of legal problems, certain forms of litigation are restricted by law to legal practitioners (McQuoid-Mason 1999). The overall goal of the clinic is to enhance the legal literacy and consciousness of the indigent citizen. Consequently, law clinics ensure that legal education is brought into direct contact with the people who have genuine legal problems, and desperately need guidance. Funding for such clinics remains a serious issue, and an issue which should be tackled by government and possibly Legal Aid in South Africa, as many clinics cannot afford to train candidate attorneys or offer satisfactory services due to lack of funding (McQuoid-Mason 1999). Legal clinics through legal clinical education are strategically placed to impart the skills of legal knowledge to the masses, through appropriate channels such as workshops and trainings. Law clinics can extend their activities to communities and tribal authorities in order to ensure that new legislation, which directly impacts on people and the communities, are made known to them. Through this approach, both legal assistance and legal literacy can be accomplished simultaneously.

6. CONCLUSION

KwaZulu-Natal Judge President, Achmat Jappie, at the annual general meeting of the South African National Editors Forum held in Durban, South Africa (Sanef June 2017) commented that, “without information citizens cannot make informed decisions. If citizens can’t make informed decisions, then they are nothing more than bunch of sheep”. As harsh as these words may seem, it is clear that the Judge was calling for a legally conscious society that supports a transformative South Africa. A transformative and legally conscious South Africa is one where people understand and enjoy their rights, and bridges the gap between people and the law, which is crucial to building an energetic and knowledgeable society (Mubangizi 2004).

The article has clearly outlined the fact that legal consciousness is an important asset for those disadvantaged socially and economically. An awareness of the law and the legal system brings about confidence and trust in a democratic society, and this has immense benefits in terms of progress towards an equal and free society. There is no doubt that South

Africa has one of the most liberal constitutions in the world, but a dearth of access to justice, and a lack of understanding of the legal process, renders most of the legislation ineffective at the stage of implementation. A largely unregulated legal profession, the political and socio-economic legacy of apartheid, unchanged foundational legal rules, and erratic state expenditure, favoring criminal rather than civil justice, have also contributed to a lack of access to justice (Klaaren 2014). A truly transformative South Africa requires a new approach that places legal consciousness at the nucleus of a new legal order. Adopting a realist approach to law, where law is seen as part of the social fabric, is key to molding a legally proficient society. Moving away from hegemonic practices can eradicate mistrust in the justice system. The field of education is key to promoting social progress and legal awareness. By its structure and arrangements, the higher education sector can promote widespread legal consciousness in South Africa, by means of a number of mechanisms including, but not limited to, street law programs, law clinics, and law school activities. Higher education can equip students with the skills, knowledge, habits, and attitudes that they would require in order to become legally conscious, and to make others legally conscious. There is an urgent need to equip people with the skills needed to be active participants in a democratic society, and only once this is achieved, will society be transformed into one that is in control of its thoughts, actions, and lives.

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