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THE POLITICAL ECONOMY OF LEGAL AID AND ADVICE SERVICES

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1. INTRODUCTION: WHY A POLITICAL ECONOMY APPROACH TO THE STUDY OF LEGAL AID AND ADVICE

Historical materialism views legal aid and advice as social phenomena consisting of legal ideas, laws, institutions and management which have not always existed and whose lives are, therefore, transitory and not of eternal character. Professional legal aid and advice are products of a particular historical epoch - the monopoly stage of capitalism or imperialist capitalism. In primeval societies characterised by clan, tribal and primitive communalistic social formations, the low level of productive forces, the common ownership of the basic means of production and the corresponding co-operative production relations did not give, and could not have given, rise to distinct legal institutions, law, or legal professionals. The limited amount of social frictions as existed were resolved in conformity with the level of development of material conditions and production relations i.e., collectively. Questions of legal aid and advice did not and could not arise under such social and material levels of development.

But society did not remain static just as it will not remain static under the currently dominant mode of production, capitalism, although capitalist idealist ideologies would want us to believe otherwise. Historical epochs and phases grew out of and replaced primitive communalism, in succeeding higher levels of civilization known as slave-owning, feudalism, and capitalism all which witnessed increasing forms of social division of labour, along class lines, and corresponding professionalisation. The development of society into antagonistic social classes based on inequality of ownership and control of basic means and instruments of production and distribution, that is, inequality in the control and use of material bases of social existence, became the major characteristic of all these known class societies. But also characteristic of these class based historical epochs has been class struggles between those who monopolise the ownership and control of the basic material basis of social existence and those they have dispossessed but depend on to produce the wealth required for the sustenance of the good life of the parasitic ruling classes.** Legal

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** For beginners to Marxist-Leninist philosophy and political economy, it would be helpful to read and study the definition of social classes as analysed by Lenin in the pamphlet, "A Great Beginning" first published in 1919 (V. Lenin, Selected Works, Moscow, Progress Publishers, 1977, pp.474-492). In the Manifesto of the Communist Party (1847) K. Marx and F. Engels, provide graphic pictures of the progressive revolutionary role played by the bourgeoisie - of course, with the feudal serfs and peasants providing the necessary labour power - in the overthrow of the primitive feudal society and the ushering in of the era of science, technology, daring adventure and new large scale /Cont...

aid and advice have their origin in these historically based class societies and class struggles of which the stage of monopoly imperialist capitalism marks the highest and last epoch.*

We find in recorded history in pre-capitalist class societies the existence of early forms of legal aid which have survived to this day. For example, in Scotland limited forms of legal aid in civil judicial matters were instituted in 1424 A.D. and for Criminal judicial matters in 1587.⁽¹⁾ In England, in forma pauperis as a form of legal aid and assistance to the dispossessed classes was legislated in 1495.⁽²⁾ In spite of these early institutionalised instances of legal aid, history had to wait a long time (over several centuries, until the 20th Century when capitalism matured and its inherent inability to create genuine conditions for social equality became apparent) before widespread, officially sanctioned, institutionalised professional legal aid and advice became a dominant ideology in the administration of justice in exploitative class societies.

If legal aid and legal advice are products of a definite historical period and thus corresponding to a given form and level in the development of material conditions and social relations of production, it becomes imperative that in our study and practice of legal aid and advice, we look not at "great minds of charity" as the basis for these social practices but rather we must study the prevailing economic relations. It is from this perspective that the science of political

cont. management of commercial and industrial production. But, once the capitalist industrial production became dominant and competition gave way to concentration and state monopoly capitalism, the developed capitalist, the big bourgeoisie, turned into a parasitic class, no longer living on the sweat of their productivity but rather on the sweat and blood (profits) of the labouring masses and the petty-bourgeois professionals hired as profession managers of bourgeois affairs. F. Engels, in an article published in The Labour Standard (London) No.14, August 6, 1881 under the title "Social Classes - Necessary and Superfluous", describes how the bourgeoisie with this growth of capitalism transformed from a "necessary" to "superfluous but a perfect nuisance" class whose only function in society remained that of perfunctory supervision, cashing dividend vouchers, speculating and gambling in the Stock-Exchanges and betting on horses. The bourgeoisie of the 1980s, a hundred years since Engels' apt analysis, is many times more parasitic and, therefore, the class that must be destroyed as a class if mankind is to liberate itself and enjoy the fruits of its collective social production, including legal services.

- * V.I. Lenin, Imperialism, the Highest stage of Capitalism (1916-1917).
1. J. Mellick, "Legal Aid and Legal Advice and Assistance in Scotland", 5th Commonwealth Law Conference, Proceedings and Papers, (Edinburgh, Scotland, 1977) pp.105-193 at 185.
 2. S. Pollock, Legal Aid - The First 25 Years (London, Oyez, 1975) p.9.

economy, approached from an historical materialist standpoint, offers the necessary analytical tools for the understanding why State sanctioned professional legal aid and advice arose at the stage in social development that it did, the role legal aid and advice play in class struggles and what future legal aid and advice will have as socialism, through bitter prolonged struggles, progressively replaces capitalism on the face of the world.

Simply, but accurately, political economy has been defined as:

"the science that deals with the laws governing the production and distribution of the material means of subsistence in human society at various stages of its development. Its subject matter is the social structure of production."⁽³⁾

Political economy from the perspective of dialectical and historical materialism also involves, of necessity, the study of the various forms of social consciousness or ideological constructs, like law and legal aid, that arise from and in turn impact upon the economic basis. If we concede the simple truth that any form of ideology has a class nature⁽⁴⁾ it follows then that legal aid and advice as ideological reflections of the economic conditions in society have a definite class nature and must not be treated idealistically outside of the struggles between the working classes, including the peasantry, and the exploiting classes who are the ruling classes.

The study of legal aid and legal advice is therefore a study of class struggles in our historical epoch. The roles played by legal aid and advice in the struggles for either social revolutions in the interest of the exploited working classes, including the peasantry, or preservation of the existing exploitative relations in the interest of the ruling bourgeois and petty-bourgeois classes must be made clear.

The contribution this paper attempts to make is, therefore, to provide a class analysis and scientific theoretical framework within which the whole question of legal aid, legal advice and alternative systems of delivering legal services can be interpreted and transformed.

2. LEGAL AID AS A FEATURE OF MONOPOLY CAPITALISM AND CORRESPONDING BOURGEOIS LEGAL IDEOLOGY

The triumph of bourgeois forms of production and exchange over feudalism in Western Europe in the 18th and 19th Centuries gave rise to a host of new ideas regarding certain social freedoms and rights of people which were not attributes of feudalism. The declaration of these freedoms and rights by the emerging bourgeoisie was a necessary and useful tool in the hands of the bourgeoisie in their bid to marshal the

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3. L. Leontyev, Political Economy: A Condensed Course (New York, International Publishers, 1975, 1981) p.7.
 4. V.G. Afanasyev, Marxist Philosophy (Moscow, Progress Publishers, 1980) pp.363-364.

support of workers and peasants against the remaining feudalist pockets of resistance. One of the most hallowed of these bourgeois declarations is that of equality before the law. As long as the law was made by them in their own interest and against the material interest of the workers and peasants. Right from the word "Go", bourgeois ideology, reflected in the idea of "equality before the law", carried within it the duty on the part of the workers and peasants to subject themselves to laws that were designed specifically to express and maintain social inequalities inherent in the capitalist mode of production. Thus, bourgeois legal ideologies quickly incorporated the class idea of equality before the law into the political legal doctrine of the rule of law,⁽⁵⁾ from which point it was to mediate and consolidate social relations. Law was then lifted out of its material and human basis and made to appear as something with metaphysical origin and above all classes. This, in fact, is a general characteristic of legal forms viewed from idealist perspectives and was not confined to the doctrine of rule of l.c."1".⁽⁶⁾

Side by side with the development of the bourgeois ideology of the rule of law, with equality before the law as its central attribute, however, was the whole development of bourgeois social institutions whose roles were to be determined by the needs of the minority ruling class and their State. Thus, State organs such as the Courts were to play not only the role of maintaining class differences through "impartial" application of partially designed laws, they were also converted into social institutions of commodities and services which were to be bought by money and not given freely to those in need who work to maintain the society. Court fees became and remain, to this day, an important source of revenue for the State in all pre-socialist societies. More importantly, the courts are organs for class dictatorship.

It was not only the financial costs involved in invoking the jurisdiction of the Courts that became a permanent characteristic feature of bourgeois Courts' thus acting as a definite hindrance to the dispossessed working class masses in pursuing their limited rights and freedoms. Elaborate technicalities and formalities incomprehensible even to the educated non-lawyers became also the proud trade mark of the bourgeois judicial process. The English tried to relax some of these rigid formalities (not content) in the 19th Century through equity, just as the Roman's had earlier done through Praetorian law, but the final result was and remains negligible to the working masses.

Many attempts at simplifying the Court formalities and technicalities have been tried in many countries either through

5. Sec Dicey's 1885 formulation of the rule of law doctrine in A.V. Dicey, Introduction to the Study of the Law of the Constitution (10th Ed. Edited by E.C.S. Wade) (London, Macmillan Press, 1959) pp.187-199; See my critique of some of the misrepresentations of reality by Dicey in S.B.O. Gutto, "Kenya's Petit-Bourgeois State, the Public and the Rule/Misrule of Law" (1982) International Journal of the Sociology of Law, Vol.10, pp.341-363.

6. L.S. Jawitsch, The General Theory of Law (Moscow, Progress Publishers, 1981) p.147.

channeling most social disputes with legal content to quasi-judicial "administrative" bodies⁽⁷⁾ or by making the ordinary Courts adopt more relaxed procedures that enables the litigants to control their cases as best they can with the Courts adopting more inquisitorial as opposed to adversarial methods of adjudication.⁽⁸⁾ All these, however, are not able, in capitalist class societies, to remove the essential character of the Courts as instruments of class rule and oppression in the hands of the minority ruling classes who possess capital; neither do they affect the basic reality that the law they administer has class content.

One other factor that was later to expose the inherent inability of a bourgeois society to deliver the equal justice it promised, even within the law that already reflected social inequalities, was and remains to this day, the unequal access to lawyers.

As bourgeois conditions of production eroded into all the remaining social formations based on primitive common ancestral links in the 19th Century or converted some of those to the service of the capitalists, and, as the division of labour progressed to all facets of life, no longer was it possible for non-professionally trained people to grasp the essence of the new legal relations ushered in by the capitalist relations of production. Professionalisation in the legal profession which had started in embryo in the late pre-capitalist formations now became an imperative. This was given added impetus by the escalation of intra-class social conflicts among the working classes who were now forced to fight each other over the falling crumbs of social wealth they were producing but which were heaped on the tables of the parasitic bourgeoisie, their exploiters. Increased also was the struggles between the two hostile camps, the working masses and the bourgeoisie. As stated above, the bourgeoisie had erected elaborate State machinery that ensured that the rule of law, their law, was the yardstick and overseer of all social conflicts. It is no wonder then that the new production relations and the advanced nature in the development of productive forces provided the seeds and fertilisers for the growth of a distinct profession, the legal profession, in service of the bourgeois society.

As practically all economic relations produce their ideological reflection in legal relations, the lawyers under capitalism became an indispensable and highly "respected" people - hence the terminologies "learned friends", "officers of the Courts", "judicial officers" etc. But, the lawyers could not escape the social currents in the organization of bourgeois production. Just as individual artisans, small and scattered manufacturers and scattered peasant producers were being forced to

7. See generally H. Street, Justice in the Welfare State, 2nd Edition, (London, Stevens and Sons, 1975).

8. See in particular the so-called "substantive justice" provisions that dispense with technicalities in the lower Courts in post-independence Zimbabwe: Statutory Instrument No. 809 of 1981 on "Community Court (Civil) Rules" made under the Customary Law and Primary Courts Act, No.6 of 1981. See also Section 17 of the Principal Act.

aggregate under the command of few monopoly capitalists and many being forced out of social existence altogether,⁽⁹⁾ so were the lawyers!

Individual lawyers conversant with knowledge of all the laws were no longer capable of being produced. Internal specialisation within the legal profession grew as a natural product of the new material conditions and this new breed of lawyers was forced to abandon the niceties of individual, independent practice and to come together under large legal business corporations. Thus the organization in the practice of law became a socialised undertaking just as the production in large-scale industry which had replaced small manufactories. Of importance here is the fact that as the legal profession became more and more a reflection of the emergent monopoly capitalism, the masses who were promised equality before the law became even further removed from access to lawyers. The founders of scientific socialism, Karl Marx and Frederick Engels, recognized this trend as early as the 1840's. This is what they said:

"The bourgeoisie has stripped of its halo every occupation hitherto honoured and looked up to with reverent awe. It has converted the physician, the lawyer, the priest, the poet, the man of science, into its paid wage-labourers.⁽¹⁰⁾

The conversion of lawyers into privileged managers, supervisors and highly paid wage-labourers of the bourgeoisie and hence their petty-bourgeois character, and their concentration under large corporate firms and the State was quite well suited to the big capitalist concerns and the State who used their services. Access to lawyers remained more and more a privilege of the capitalists. The door to legal services was then closed to the labouring masses.

Empirical studies in the second half of the 20th Century have clearly established the above as a fact.⁽¹¹⁾ Of course, one still finds individual practitioners struggling to survive in the harsh market of monopoly capitalism but these are mere auxiliary, mere residue. Rich law firms and lawyers serve big capital - in fact their training and their bigness is dictated by the few capitalists who monopolise their services and who dictate the type of legal work that they must practice. The study by Dennis Lynch on the nature of the legal profession in Colombia is quite clear on this point, although he gives the legal profession an incorrect inflated autonomy from the material

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9. See Engels' synthesis of this historical development, which is treated more in detail by Karl Marx in Capital Part IV, in Socialism: Utopian and Scientific (Peking Foreign Languages Press, 1975) pp.76-85.
 10. K. Marx and F. Engels: Manifesto of the Communist Party (London, Lawrence and Wishart, 1983) p.16.
 11. See generally, Dennis O. Lynch (editor) Legal Roles in Colombia (New York, I.L.C., 1981) and C.J. Dias, et al (editors), Lawyers in the Third World: Comparative and Developmental Perspectives (New York, I.L.C., 1981).

basis which in fact shape them. This is what he summarized from his impressive empirical study:

"They (the rich lawyers) use this aura to help shape an acceptance of the existing social hierarchy by determining what are the legitimate demands on the political and economic systems the demands or needs which people perceive as legitimate are partially determined by the organization of legal services and by what attorneys recognize as a legal right. Attorneys responses reflect a combination of their training, their position as a part of the privileged classes, and the legal needs of the economic groups on whom the profession depends for its economic security. (12)

From a historical materialist perspective then, it can be seen clearly that monopoly capitalism produces and dictates the form and character of the work of lawyers in all capitalist societies. To the extent that the exploitative interests of capital are better taken care of in non-socialised systems in the delivery of legal services, capitalism will not work for an alternative system that will arm the labouring masses with sufficient legal weapons with which to struggle to advance and protect their revolutionary demand, and needs. Restrictions on the ability of the labouring masses to have access to legal services and the law to defend their interests in capitalist societies is, therefore, not peculiar but is a general feature and demand of class domination. This explains clearly why in Zimbabwe the Law Department at the University of Zimbabwe had an annual average enrollment rate of first years of only 40 students prior to 1979 in spite of the fact that millions needed the services of lawyers but could not get them or afford them. This figure dropped to a figure in the 20's in 1979, it then rose to 70 and then 89 in 1980 and 1981 and started falling to 74 and 48 in 1982 and 1983. The figures for 1984, 1985 and 1986 have remained below the 70 mark, for each year. This falling trend is in direct contradiction to the needs of the population which is expanding rapidly. But this trend is quite in line with the general morality under capitalism. The behaviour of the University which produces lawyers is also conditioned by the so-called "market forces" which determine whether or not the lawyers the University produces will be employed as well as the general trend in non-expansion of the teaching staff or library services and all other material factors inherent in the prevailing capitalist production relations.

Having underlined the basic material, social and ideological conditions under which modern capitalism has shaped the law and access to legal services by the different, antagonistic, social classes inherent in capitalism, it is important now to briefly indicate why capitalism, in spite of it being a system opposed to socialisation of legal services for the benefit of the whole society, has in fact found itself spearheading the ideology of legal aid and advice in the 20th Century.

The bourgeois declarations of "liberation" and "equality" to all that characterized the bourgeois revolutions of the 18th and 19th Centuries were quite an advance over pre-capitalist social ideas.

12. Lynch, op. cit., note 11 at p.59.

However, to the extent that bourgeois society is a class society, a society of inequality in material as well as in other social products of human labour, these "equalities" were destined to be confined to the enjoyment of the minority ruling classes. To the extent that social consciousness often, but not always, lags behind the development of social being,⁽¹³⁾ the emptiness of the hallowed bourgeois freedoms and rights to the labouring masses began to descend upon the society only after a considerable lapse of time. It can be said with conviction that the development of scientific socialism as the ideology of the labouring masses in the middle of the 19th Century, and thereafter, helped a great deal in exposing the inherent inability of the bourgeois society to live up to its promises and declarations.

It therefore came to pass that by the beginning of the 20th Century, the working class was already consolidating its forces and was able to make concrete demands on the bourgeoisie to ensure that the impoverished masses also had access to State institutions such as the Courts and to some legal assistance that only the exploiting classes were able to afford through the social wealth they had appropriated from the rightful producers. The declarations the capitalists had made to cloak the reality of their production relations now became potent weapons in the hands of their class enemies, the workers and peasants.*

In addition to the demands made by the labouring masses on the ruling classes within each country, the bourgeoisie in all countries of the world began, since 1917, to confront scientific socialism which had become a practical reality beginning with the 1917 Great October Socialist Revolution in the U.S.S.R. The practical transformation of bourgeois society under the dictatorship of the workers, in alliance with the peasantry and revolutionary intelligentsia, started demonstrating practically that it is only under socialism that the ideals of equity and justice for the majority of the working masses is possible.

The combined force of internal struggles between the bourgeoisie and the labouring masses of and in each country combined with the global struggles between socialism and capitalism have naturally led to a host of concessions to the working classes. These concessions are, therefore, the outcome of bitter class struggles and not based on the kindness and love the bourgeoisie have for the working classes. For, truly, there is no love between exploiters and the exploited.

Legal aid and legal advice became since 1917 part and parcel of a generalised response of capitalism to the demands of the working classes for improved economic conditions as well as the pressure put on capitalism by socialism. The proliferation of State sanctioned legal aid and advice systems sprouted just before the imperialist World War II but more so immediately after the war, although not in the colonial empires

13. Afenasyev, op. cit., note 4 at pp.356-357.

* F. Engels in Anti-Duhring (1976, Foreign Languages Press, Peking) made it clear that by the 2nd half of the 19th Century, the labouring masses had gone beyond bourgeois concepts of equality and were demanding the abolition of classes as the ultimate form of human rights and equality. (pp.134-145).

which were still suffering under the yoke of imperialist fascism. Examples of legislations to this effect are the New Zealand Legal Aid Acts (Civil cases) of 1939, 1954 and 1969; the Legal Aid and Advice Act of 1949 in England and Wales; and, for the U.S.A., the so-called Equal Opportunity Act of 1964. (14)

It needs to be pointed out, however, that the bourgeois State was able to initiate these reforms only by renouncing one of the theoretical foundations of bourgeois freedoms - the absence or pretended abstention of the State from direct involvement in economic and social activities. It also needs noting that these reforms were only possible, on a widespread basis, because of the material wealth plundered by imperialist capital in foreign countries and peoples' centuries. In order that legal aid, as part and parcel of capitalist reformism into the so-called "Welfare State", could be possible, the material basis for it had to be developed. The bitter struggles by capitalism to extend its lease of life following the imperialist inspired World War II had, of course, to develop within a respectable ideological arsenal to help imperialism explain the new changes forced upon it. Typical of any ruling class forced to give concessions by the mighty force of those it oppresses and preys on, the bourgeoisie could not, of course, openly declare that legal aid and advice services were a reflection of their inability to continue with their system of production and distribution in the old way.

The whole bourgeois and petty-bourgeois ideology of "aid" (15) and philanthropy was marshalled to try and represent capitalists as kind-hearted and caring people with infinite justice and, therefore, worthy of love and admiration by the working classes. In fact the new trend in provision of legal aid even produced new petty-bourgeois "legal missionaries", the so-called "poverty lawyers", who without realising their true role in the battle for capitalist survival came to regard themselves as revolutionary champions working only for the "interests of the poor".

The bourgeoisie, since 1917, has organised to combat socialism by all means and the Welfare bourgeois State, with legal aid as one of its attributes, was to be a weapon in this life and death struggle. Added to this, legal aid and legal advice served to promote the whole resurgence of the ideology of the rule of law and equality before the law which the bourgeoisie needed in order to disassociate capitalism from its fascist tendencies that were clearly manifesting themselves

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14. The National Office of Economic Opportunity (OEO) which provided the basis for legal services was established under P.L. 88-452 of August 20, 1964 (42 U.S.C., as 2701, 2809(a) (3) (1970)) - see Samuel J. Brakel, Judicare, Public Funds, Private Lawyers, and Poor People (Chicago, A.B.F., 1974) p.1.
 15. The bourgeois ideology of "aid" permeates all bourgeois relations today and can be seen in such exploitative relations as those which involve the export of finance capital by bourgeois institutions to areas where it can receive higher returns. For the character of such "aids" see T. Nayer, Aid as Imperialism (Middlessex, Penguin Books, 1971, 1972).

from the 1920's onwards, the Nazi regime being only the worst form of bourgeois fascism. Provision of limited legal service to the poor also became a necessary weapon in the hands of the bourgeoisie in their effort to teach the oppressed classes to use law rather than more radical methods for social revolution. The revival of idealist bourgeois concepts and philosophy of "natural law" accompanied these efforts.⁽¹⁶⁾

Even in the former colonies of imperialism which became independent after the imperialist World War II, the bourgeois ideology of equality before the law were quickly being drafted into the "independent" Constitutions by the very imperialists who had up until then not permitted their colonial subjects the enjoyment of the minimal benefits that the working classes had won in the metropolis. We find in these bourgeois schemes elaborate provisions on equality before the law but which reduce themselves to nothing since access to the courts and competent lawyers are functions of private wealth rather than needs based on one's contribution to the production of social wealth in the society. A good recent example of such bourgeois hypocrisy is recorded under sections 13 and 18 of the Zimbabwe Constitution of 1980 where it is stated that:

13 (3) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him. (Emphasis added).

18 (1) Every person is entitled to the protection of the law.

Section 18 then proceeds to add that whoever is charged with a criminal offence:

- (3) (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted himself in person, or save in proceedings before a local Court, at his own expense by a legal representative of his own choice. (Emphasis added).

From the clear wording in these provisions, the contradictions and emptiness to the masses of bourgeois declarations show themselves nakedly. The secure protection of the law is promised in these provisions and then taken away and rendered useless by the provision requiring the people to pay for the services when the wealth is not in the hands of the working and unemployed masses. The "rights" are, therefore, not realisable under criminal legal process as well as under civil legal processes which cover considerable aspects of one's social relations. It has been established in certain leading bourgeois

16. V.A. Tumanov, Contemporary Bourgeois Legal Thought: A Marxist Evaluation of the Basic Concepts (Moscow, Progress Publishers, 1974) pp.77-86 and 268-284.

judicial organs that equal protection of the law is an empty shell if it is not accompanied by effective material assistance to enable the indigent to pursue their (limited) rights in the Courts with assistance of lawyers.⁽¹⁷⁾

It may be argued that the fundamental emptiness of the above provisions in the Zimbabwean Constitution are somehow covered by the limited provisions of in forma pauperis as well as pro deo briefs. Empirical studies, however, have shown that these are mere window-dressing provisions giving very little and, in many respects, incompetent real assistance.⁽¹⁸⁾ Neither can it be honestly claimed that the legal aid clinic at the Law Department of the University of Zimbabwe, which started in 1974 is of any significant assistance to the millions of workers and peasants who have been condemned to permanent poverty by the imperialist capitalist relations of production that predominate. Some idealistic appraisal of the legal aid clinic at the University has showered glories on the programme in the past.⁽¹⁹⁾ The basic fact remains, however, that all these schemes are limited indeed and are bound to remain so as long as imperialism maintains its strong hold on economic relations and directs social relations of production and distribution.

3. LEGAL AID AND THE STRUGGLE FOR SOCIALIST TRANSFORMATION: WHAT NEEDS TO BE DONE

I have attempted to show, and I hope successfully in the foregoing parts of this paper that, among other things, access to professional legal assistance and ready access to the courts are essential ideals of social justice in any class society, capitalist or socialist - the latter particularly in its early phases when it is grappling with the social ills it inherits from the bourgeois world which it negates. The need

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17. European Court of Human Rights at Strasbourg, Airey v Ireland (The "Airey Case"), Judgement of 9th Oct. 1979.
 18. See a recent study by a final year law student at the University of Zimbabwe: R. Costa, Pro Deo and In Forma Pauperis Systems in Zimbabwe: Do they Adequately Protect the Poor and Underprivileged? (Jurisprudence Dissertation, 1983). In 1986 the Legal Practitioners Amendment Act was passed. It tries to compel the unwilling lawyers to occasionally take pro-deo briefs. This has met with general disapproval of bourgeois lawyers who view this as an erosion of their human rights (i.e. their pockets and the "freedom" to decide whether or not to provide "charity" to the dispossessed). In fact according to the "McNally Committee Report" (Govt. Committee to Enquire Into The Qualifications For Registration As A Legal Practitioner, 1986) Harare, which has only 12% of the national population of Zimbabwe, has 58% and 72% of law firms and registered legal practitioners, respectively. This shows clearly how capitalism concentrates resources, not in accordance to needs!
 19. A.N. Donagher, "The University of Rhodesia Legal Aid Clinic: An Example for South African Universities in the Field of Legal Training?" (1978) Responsa Meridiana Vol.3, No.5, pp.325-330.

for such professional assistance is based on the simple fact of division of labour and professional specialisation that characterises developed economic production relations. From the historical analysis of the material basis for the emergence and implementation of legal aid and advice services, it emerges clearly that the rise of legal services to the poor during the monopoly, and last, stage of capitalism is simply a reflection of the admission by capitalism that the production relations that characterise it are incapable of creating genuine equality for all. Most (the masses) need it while the rest (the ruling class) do not need such aid. It also reflects an advanced stage in the struggle between labour and capital in each country and internationally.

Scientific laws of social development, the subject matter of political economy, show that it is impossible for capitalism as a system of production and exchange to provide equal access to these needed services no matter how hard it tries and no matter how strongly individual capitalists or their agents, the petty-bourgeoisie, may feel. Private ownership and control of the means of production and exchange and the concentration of such ownership in fewer and fewer hands at the monopoly stage of capitalist production is incompatible with equal access to material and other essential services for all.

The problem with legal aid under capitalism is therefore not so much the idea but rather the inherent inability of the system to translate the idea into practice without negating itself. Already, several decades have now passed since legal aid became an acceptable and widely practised institution in practically all advanced capitalist societies as we have seen above. Many years have also passed since many developing countries which follow the capitalist path to "development" initiated legal aid and advice services.⁽²⁰⁾ All these have proved themselves to be of very limited help to the working masses in pursuing their limited rights and freedoms under a system that has and must of necessity condemn them to perpetual misery, beggary and hard labour without enjoying the fruits of their labour.

There is already growing disenchantment with legal aid as practised under capitalism even among those who, on the whole, support the capitalist system. Writing for the American Bar Foundation, Samuel J. Brakel had the following to say:

"The increasingly recognized reality is, however, that the legal services program as presently oriented - that is, delivery of services by a corps of full-time salaried "poverty lawyers" staffing special neighbourhood or regional "poverty law" offices - is meeting neither its own goals and standards nor even the expectations of those who did not share the institutional optimism⁽²¹⁾

20. See Surveys in, Committee on Legal Services to the Poor in Developing Countries, Legal Aid and World Poverty: A Survey of Asia, Africa, and Latin America, (New York, Praeger Publishers, 1974); F.H. Zeman (ed.) Perspectives on Legal Aid: A Comparative Survey (London, Frances Printer, 1979).

21. S.J. Brakel, op. cit., note 14, at p.2.

The services as provided under capitalism are not just inadequate in coverage and destined to remain so for the needs of the millions under capitalist subjugation, they are also unequal and inferior to the privatised legal services available to the capitalists. This is the case primarily because capital attracts and helps to develop the best in its own interest. Of the Colombian experience, Lynch had this to say:

"..... the quality of legal services in the public sector (including services of lawyers in salaried employment in the government) is likely to be inferior to the legal counselling obtained by private clients.⁽²²⁾

The concentration of legal aid under capitalism has also been in the area of legal defence in criminal cases and very little on civil matters. Very little has been done in the area of general legal advice access to which capitalists have made part and parcel of their own daily social existence. The emerging so-called "public legal education programmes", mostly funded by hypocritical bourgeois philanthropy, attempts to fill such gaps. However, the extent to which proper public education can be carried out among the masses who need the type of education as would arm them to overthrow the capitalists and dismantle the capitalist production relations is obviously officially circumscribed under capitalism.

¹ Whatever the limitations of all these approaches to the delivery of legal services to the indigent working classes under capitalism may be, however - and these limitations are fundamental and cannot be glossed over - it is still necessary to recognise the necessity of retaining and further demanding the expansion of such services. In particular, the public legal education approach has the potential not only of dealing with isolated individual cases but also arming a larger section of the working class and peasants with knowledge of the limitations of pursuing their freedom through bourgeois laws.

In pursuing all these efforts of expanding and improving the gains of the labouring masses under capitalism, we must guard against falling into the trap of bourgeois and petty-bourgeois socialism which are nothing but charity and philanthropy within capitalism. We must also distinguish between the needs of the labouring, exploited masses which is reflected in the ideology and revolutionary struggles of scientific socialism or Marxism-Leninism and the appealing, but false, bourgeois and petty-bourgeois "socialisms" which preach peaceful and legal means as the only roads to socialism. In other words, even if we were to assume the impossible that capitalism is able to provide equal legal services to all, the capitalist legal relations and laws that would prevail are reflections of economic relations of inequality and exploitation. There still exists and would still exist the need for the working class and the poor peasantry to look beyond legal aid under capitalism and to struggle for the overthrow of the bourgeois social order. For, without a fundamental social transformation carried out by the majority of the masses now under capitalist oppression, the capitalist State and its instruments and institutions of class rule will remain essentially the same.

22. Lynch, op. cit., note 11 at pp.92-93.

It is only by fundamental transformation in the material conditions of production and exchange and the resulting material ability of all to afford the Courts' and lawyers' costs, if payments are needed at all, as well as the transformation of oppressive bourgeois laws and the creation of socialist legality and law that the working classes can truly enjoy real equality before the law. Already, surveys carried out on the articulation of access to legal services in developed and semi-developed socialist countries show the superiority of socialism over capitalism.⁽²³⁾ Socialism does not simply inherit and transplant the bourgeois Court, the bourgeois judge and the bourgeois advocate or lawyer.⁽²⁴⁾ It creates new laws, new Courts, new judges, new judicial processes and new lawyers:

"Socialism has, by overcoming those social conditions which make the advocates only too frequently to become certainly sometimes very artful law-jugglers in the interest and pay of the client with the highest bid, given back to them their moral reputation. By making such a statement the particular merits of progressive lawyers are not intended to be depreciated but rather emphasized, because it is them who under the capitalist relations, which treat everybody and everything as a mere commodity, preserve their integrity and confront bourgeois justice with democratic commitment."⁽²⁵⁾

In Zimbabwe where the Government, through the ruling Party, ZANU(PF), has adopted scientific socialism as the ideology of the State and society, it is pertinent that approaches to legal aid and advice be structured in line with and be approached from the position of using the system as a tool for the struggle for socialism and not simply a reproduction of the bourgeois models we have already shown to be essentially bankrupt. It is not only the Minister of Justice, Legal and Parliamentary Affairs⁽²⁶⁾ or the Attorney General⁽²⁷⁾ who have expressed the Government's desire to make access to institutions of justice affordable to all or to ensure that all who need legal advice do get them. Access to legal services by all and the dismantling of colonial bourgeois legal structures is an immediate declared policy of the

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23. See, E. Wenberek, "Socialist Countries: Eastern Europe", in F.H. Zemans, op.cit. note 20, pp.272-287.
24. See J. Brady, "The Revolution Comes of Age: Justice and Social Change in Contemporary Cuba", in C. Sumner (ed.) Crime, Justice and Under-development (London, Heinemann, 1982) pp.248-300.
25. K. Wunsche, "New Legal Foundations for Advocates Activities", Law and Legislation in the G.D.R., Vols. 1-2/1981, pp.5-8, at p.6; See also, generally, V. Terebilov, The Soviet Court (Moscow, Progress Publishers, 1973) and Y. Stetsovsky, The Right of the Accused to Defence in the USSR (Moscow, Progress Publishers, 1982).
26. See a parliamentary question reply by the Minister, Cde. E. Zvobgo, reported in the Herald (Harare) 3/2/1984.
27. See a report in the Herald (Harare) 6/2/1984.

Government.⁽²⁸⁾ It is in this light that it is incumbent upon those of us charged with the responsibility to train new lawyers who will go into private practice, to the bench, public employment and all institutions needing legal knowledge to endeavour to provide the correct ideological and legal orientation to our students. To the extent that the legal superstructures are products of and must correspond to material basis, our participation in ensuring that the legal institutions are transformed do, of necessity, require us to participate in all spheres of the struggle for socialism.

One cannot build a good socialist judicial system (which ensures that the masses participate in making the laws and in the determination of cases in the courts) in a society in which the wealth and hence social power remain in the hands of the minority capitalists. The legal superstructure rests and reflects the dominant economic structure in society but the two dialectically, not mechanistically, influence each other. In other words, lawyers need to view legal aid and services as forms and media for class struggle and not as ends in themselves. It is only in a society where the working people have dominating economic and political power that social equality, including equality before and of access to the law, will prevail. That society can only be a socialist society.

28. Republic of Zimbabwe, Transitional National Development Plan, 1982/83 - 1984/85, vol. 2, (Harare, Govt. Printer, 1983) Chapters XXII and XXIII.



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