

1-1-1985

Lawyers, Alternative Lawyers, and Alternatives to Lawyers: Of Thomas Hobbes and Rumpelstiltskin

Jack A. Hiller

Follow this and additional works at: <http://scholar.valpo.edu/twls>

Recommended Citation

Hiller, Jack A. (1985) "Lawyers, Alternative Lawyers, and Alternatives to Lawyers: Of Thomas Hobbes and Rumpelstiltskin," *Third World Legal Studies*: Vol. 4, Article 1.

Available at: <http://scholar.valpo.edu/twls/vol4/iss1/1>

This Article is brought to you for free and open access by the Valparaíso University Law School at ValpoScholar. It has been accepted for inclusion in Third World Legal Studies by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

I. OVERVIEWS

LAWYERS, ALTERNATIVE LAWYERS, AND ALTERNATIVES TO LAWYERS: OF THOMAS HOBBS AND RUMPLESTILTSKIN*

Jack A. Hiller**

Introduction

In response to the growing interest in alternative techniques of dispute resolution, I set forth here some observations on lawyers, alternative lawyers and alternatives to lawyers. There is already some excellent literature available. For example, Jim Paul and Clarence Dias, along with their colleagues, have put together a fascinating book: *Lawyers in the Third World: Comparative and Developmental Perspectives*.¹ That is a rich store of ideas. I propose to offer some additional thoughts on this general topic in light of some peripatetic gleanings from linguistics, anthropology, jurisprudence and fairy tales. The focus here will be the Third World, though the lessons apply to the First and Second Worlds as well.

Thomas Hobbes

Thomas Hobbes pointed out that one of greatest powers possessed by the state was that of naming, putting labels on, or defining things.² The

* This article is based on a paper presented at the Eighth Annual Symposium on Law and Development, "Alternative Lawyers in the Strategies for Alternative Development," at the University of Windsor (Ontario) Faculty of Law, March 24-26, 1983. It is produced here with the permission of Symposium organizers, who will publish the original paper in the Symposium Proceedings and who retain all rights.

** Professor of Law, Valparaiso University School of Law; sometimes Professor of Law, Faculty of Law, University College, Dar es Salaam (Tanzania) (as it was then known) and Professor of Law, University of Nairobi.

1. C. DIAS, R. LUCKHAM, D. LYNCH & J. PAUL, *LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES* (1981) See, especially, ch. 14 by C. Dias and J. Paul, *Lawyers, Legal Resources and Alternative Approaches to Development* [hereinafter cited as Dias and Paul].

2. The specific cite is lost from my memory. He makes the point generally in ch. 4 of his *Leviathan*. Similarly Sanche de Gramont points out the importance of the state's labeling process:

state, in doing so, legitimates things, calls them into being,³ creates rights, powers, privileges, immunities and so on.⁴ If we just think of the significance of words like "corporation,"⁵ "partnership," "marriage," "doctor," "lawyer," even such a broad concept as "property,"⁶ we immediately realize what advantages such labels bestow or what consequences they have. Not just any two or three or four or more people can enter into a "marriage."⁷ Not just anyone can act as a "lawyer."

Closely related to naming or labeling is *classification*. Professor Keeton has pointed this out:

Classification is part of the process of seeking organizing principles. It is a useful—perhaps even inevitable—way of signifying similarities that warrant like treatment or differences that warrant contrasting treatment. Also, resort to classification in the analysis of a particular

"The Code Civil took record keeping away from the church, and set up public records offices, which defined the individual's legal existence - his birth, his death, his marriage, and his children. What is not set down in the margins of the *acte d'état civil* cannot be proved real. Registration of birth is more important than birth itself."

"The archetypal French joke has to do with the relations between the individual and the state. A man goes to his local *mairie* to register the birth of his son.

'Last name?' the clerk asks.

'Hugo.'

'First name?'

'Victor.'

'Congratulations,' says the clerk, 'on being the father of France's greatest poet.' 'S. DE GRAMONT, *THE FRENCH: PORTRAIT OF A PEOPLE* 208 (1969).

3. On the international level the act of "recognition" of statehood is seen by some as a state-creative or right-creating event; that is, the act of recognition is "constitutive" of the state recognized. See, e.g., I. BROWNIE, *PRINCIPLES OF INTERNATIONAL LAW* 93-94 (2d ed. 1973).

4. One could call into play the entire Hohfeldian scheme at this point. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS* (W. COOK ed. 1923).

5. American lawyers teethe on Chief Justice Marshall's definition of a corporation: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

6. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

7. The reader can conjure up all sorts of implications and consequences arising out of the established orthodoxy in various cultures resulting from the state's calling a union a "marriage." Similarly, consider the word "wife." In the Zanzibar case of *Abdulrahmin bin Mohamed v. R.* [1963] E.A. 188, the question arose whether the defendant's wife by native custom was a competent witness against him in a criminal prosecution. Under the English common law, which was the received law of Zanzibar, the husband or wife of the person charged was not a competent witness for the prosecution. Sir Ronald Sinclair, for the Court of Appeal for East Africa stated: "The marriage [though monogamous] appears to have all the elements of 'wife purchase'. . . . There was no religious ceremony or, indeed any ceremony at all. The [defendant] merely paid Shs. 200/- for her. . . . Either party could buy his or her release at any time. It may well be a valid marriage in Zanzibar but . . . we do not think the wife of such a marriage is within the purview of the general view that the husband or wife of the person charged is not a competent witness for the prosecution." *Id.* at 192-93. In short, she did not fit the state-imposed English definition of "wife."

problem can serve the creative function of suggesting ideas that might be useful in dealing with it. But classification can also be constricting because of its influence toward limiting the perspectives from which the problem is examined.⁸

So we become captives of or slaves to labels, language,⁹ systems of classification and our structures and institutions. When we think of lawyers and alternative lawyers it suggests that we are thinking of people who do or can do what "lawyers" do—who do, in Llewellyn's words, "law-jobs."¹⁰ There is a kind of circularity and trap here: Lawyers do law-

8. R. KEETON, *INSURANCE LAW: BASIC TEXT 1* (1971). The following is an excellent example:

Consider, for example, a totally different kind of learned book, the Chinese encyclopedia imagined by Jorge Luis Borges and discussed by Michel Foucault in *The Order of Things*. It divided animals into: "(a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camel hair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies." This classification system is significant, Foucault argues, because of the sheer impossibility of thinking it. By bringing us up short against an inconceivable set of categories, it exposes the arbitrariness of the way we sort things out. We order the world according to categories that we take for granted simply because they are given. They occupy an epistemological space that is prior to thought, and so they have extraordinary staying power. When confronted with an alien way of organizing experience, however, we sense the frailty of our own categories, and everything threatens to come undone. Things hold together only because they can be slotted into a classificatory scheme that remains unquestioned.

R. DARNTON, *THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY* 192 (1984), quoting M. FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* xv (1973). The quotation may also be found in Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFFAIRS 66, 76 (1972). Consider the magical origin of our categories:

[O]ur terminology and our ideas bear a considerable structural resemblance to primitive magic thought concerning the invocation of supernatural powers which in turn are converted into factual effects. Nor can we deny the possibility that this resemblance is rooted in a tradition which, bound up with language and its power over thought, is an age-old legacy from the infancy of our civilization.

Ross, *Tu-Tu*, 70 HARV. L. REV. 812, 818 (1957).

9. Some anthropologists assert that we are "prisoners" of our language. This point was long ago labeled the *Sapir-Whorf hypothesis* and is reflected in the following passage: "Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society The fact of the matter is that the real world is to a large extent unconsciously built up on the language habits of the group. No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached." Sapir, *The Status of Linguistics as a Science*, 5 LANGUAGE 207, 209-14 (1929). The problem dealt with in the present paper is even more sinister: Many people are prisoners of *someone else's* language! On law and language, see note 12 *infra*, Grossfeld, *Sprache und Recht*, 36 JURISTEN ZEITUNG, Jan. 6, 1984, at 1 and Williams, *Language and the Law* (pts. I-V), 61 L.Q. REV. 71, 179, 293, 384 (1945) and 62 L.Q. REV. 387 (1946).

10. Karl Llewellyn, articulating a functional jurisprudence aimed at better enabling lawyers to serve the needs of society, in performing what he called "law-jobs," said, "Around the law-jobs (which are inherent in the nature of any group, big or little) there develop (in any group) activities. When these activities become distinct enough to be recognizable as such, the stuff of law has thereby

jobs; law-jobs are what only lawyers do.¹¹ We will come back to this, but it is worth stressing at this point the additional problem that when we are discussing lawyers and law-jobs in the context of the Third World, we are dealing to a great extent with non-indigenous, other-cultural institutions and roles which have immigrated with all sorts of excess baggage¹² having all kinds of foreign labels.

Rumplestiltskin

There is another side to names, labels and definitions that deserves our attention. The best way that I know of "getting a handle on it," and I think that that bit of vernacular wisdom is an apt expression, is to call it *Rumplestiltskinizing*.

One of the Grimms' fairy tales¹³ bears setting out at length here for purposes of this analysis. It begins with a poor miller who tells the avaricious king that his (the miller's) beautiful daughter could spin gold out of straw. Of course she could not. Putting her to the test, the king set her up in a room in the castle with straw, wheel and spindle, saying, "If by morning thou hast not spun this straw to gold thou shalt die." While she was weepingly pondering how she was going to save her life, the door opened and a little man walked in. He agreed to spin the straw into gold and did so on successive nights in exchange for the girl's

become recognizable." MY PHILOSOPHY OF LAW 187 (K. Kocourek ed. 1941). See also Llewellyn, *The Normative, The Legal and The Law-Jobs: The Problem of Puristic Method*, 49 YALE L.J. 1355 (1949) and K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* PT. III (1941). In addition see LAWYERS IN THEIR SOCIAL SETTING (D.N. MacCormick ed. 1976), a fascinating set of essays describing "the emergence of such specialisation and the way in which the emergent men of law go about the law-jobs" in a number of societies. *Id.* at vii.

11. One is reminded of the problem in U.S. Constitutional/International Law of distinguishing between an "executive agreement" which can be entered into by the President without Senate approval and a "treaty" which requires Senate approval. To settle the matter a senator addressed a request to the State Department "to clarify as clearly as they could . . . what they thought constituted a treaty and what they thought constituted an executive agreement." The reply was that "a treaty was something they had to send to the Senate in order to get approval by a two-thirds vote. An executive agreement was something they did not have to send to the Senate." The Senator reports: "At the time I stated to the Senate that the reply of the State Department reminded me of the time when I was a boy on the farm, and asked the hired man how to tell the difference between a male and a female pigeon. He said, 'You put corn in front of the pigeon. If he picks it up, it is a he; if she picks it up, it is a she.'" 100 CONG. REC. 1742-43 (daily ed. Feb. 15, 1954).

12. I have dealt with this aspect of the problem at some length in my *Language, Law, Sports and Culture: The Transferability or Non-Transferability of Words, Lifestyles and Attitudes Through Law*, 12 VAL. U.L. REV. 433 (1978), reprinted in expanded form in M. MARASINGHE & W. CONKLIN, *LAW, LANGUAGE & DEVELOPMENT* 151 (1985).

13. "Rumplestiltskin," in *HOUSEHOLD STORIES FROM THE COLLECTIONS OF THE GERMAN BROTHERS GRIMM* 203 (L. Crane, transl. 1951).

necklace and ring. The king was thrilled and promised that if the girl would spin straw into gold the third night, he would make her his queen. Having nothing left to give the little man for the night's work, the girl agreed to his demand: "Then you must promise me the first child you have after you are queen." The gold was spun and the girl became queen.¹⁴

A year later a fine child was born to her, and shortly thereafter the little man reappeared to hold her to her promise. He refused her alternative offer of "all the riches of the kingdom," philosophically saying, "No, I would rather have something living than all the treasures of the world."

The weeping and lamentations of the young queen caused the little man to have pity on her, so he said, "I will give you three days, and if at the end of that time you cannot tell my name, you must give up the child to me." He came the next two days and, though she went through all the names she knew and several absurd, made-up ones, she could not guess his. The third day one of her messengers, through peculiar and coincidental circumstances which you will learn if you read the story, brought her the name "Rumplestiltskin."

The end of the story relates this encounter when the man challenges the queen to name him:

"Are you called Jack?"

"No," he answered.

"Are you called Harry?" she asked again.

"No," answered he. And then she said

"Then perhaps your name is Rumplestiltskin!"

"The devil told you that! The devil told you that!" cried the little man, and in his anger he stamped with his right foot so hard that it went into the ground above his knee; then he seized his left foot with both hands in such a fury that he split in two, and there was an end of him.¹⁵

The moral, in case you do not remember drawing it from the story when and if you heard it at your mother's knee - at least the moral I derive from it, is that if you can name something, can put a label, a "handle" on it, you have a power over it or, at least, it has no power

14. The brothers Grimm do not tell us what happened, after the wedding, when the king found out that she *couldn't* spin gold from straw. That must have produced a terrific marital squabble. But it could be that he never found out. Perhaps he was too preoccupied by her charms or, maybe, considering what men were like in the olden days, he told her not to spin any more, fearing that he would acquire the reputation of a king whose wife had to work.

15. *Id.* at 206-07.

or less power over you. In a way, it is Hobbes' point turned around.¹⁶ If we can describe what lawyers do, put a name on the "law-jobs," we can remove the magic, the mystique.

16. Literature is replete with examples of the power inherent in learning secret or hidden names. For example, in Wagner's *Lohengrin*, based largely on the old anonymous German epic of the same name, catastrophe comes from Elsa's demanding to know Lohengrin's name. The root of this part of the story and opera probably is to be found in the primitive belief that a man's name is part of his very being and that if one discloses his name to a stranger and possible enemy, he gives the latter power over his life. For another example, in Act Two, Scene Two of Puccini's *Turandot*, Calaf tells Turandot that he will release her from her oath (to marry him, who answered the three "enigmas") if she can tell him his name before dawn. The point made by the Rumpelstiltskin story in the text above is illustrated with a somewhat different inference by the following lines from T.S. Elliott's *The Love Song of J. Alfred Prufrock*, describing the effect of *others'* putting labels on *us*:

"And I have known the eyes already, known them all
The eyes that fix you in a formulated phrase,
And when I am formulated, sprawling on a pin,
When I am pinned and wriggling on the wall . . ."

T. ELLIOT, *THE WASTE LAND AND OTHER POEMS* 5 (1934). Sartre, on the other hand, tells us of the effects of putting names or labels on *ourselves* or seeing and thinking of ourselves in certain ways. He says that one "identifies and defines" *himself* by the ends that he pursues. He creates himself and is made responsible by his choices, what he chooses to be, what he sees himself as being. See J. SARTRE, *BEING AND NOTHINGNESS passim, esp.* 485 (H. Barnes trans. 1956). See also as to Sartre's views Olafson, *Authenticity and Obligation* in *SARTRE: A COLLECTION OF CRITICAL ESSAYS* 157 (M. Warnock ed. 1971). Therefore there are moral implications in how we label or define ourselves. With a slightly different twist, Kurt Vonnegut tells us: "We are what we pretend to be, so we must be careful about what we pretend to be." K. VONNEGUT, JR., *MOTHER NIGHT V* (1966). Finally (or should one say, "first"?) is the Genesis account of creation: God gave Adam "dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." *Genesis* 1:28. This "dominion" was described further: "[T]he Lord God formed every beast of the field, and every fowl of the air; and brought them unto Adam to see what he would call them: and whatsoever Adam called every living creature, that was the name thereof." *Genesis* 2:19. (In a more prosaic sense, by naming my dog I have a power over him or at least a means of using the power I have over him.) See also note 2 *supra*. Of course the reader will notice that the Rumpelstiltskin phenomenon (being able to label or name something gives one power or control over it) is part of the foundation of modern psychology. Related to all this, also, is the vast literature on role theory.

In addition, names help us *see* things better. It is said that Eskimos can differentiate among twenty types of snow because they have separate names for them. A literary illustration of this is R.H. Blyth's comment on the following *haiku* by Teiji:

A flowering weed;
Hearing its name,
I looked anew at it.

The poet looked at it with quite different eyes after he knew its name. Associations of all kinds, historical, poetical, medical, now coloured his vision. But this does not necessarily mean that his view was distorted by these associations. It might have been so, but on the other hand the name might have revealed to him the flower's true nature, causing him to know what to look for, what to see. Blake says, "The fool sees not the same tree that a wise man sees."

4 R. BLYTH, *HAIKU: AUTUMN - WINTER* 1101 (Paperback ed. 1982).

Lawyers

Though throughout the Third World, "lawyers," in the traditional Western sense, are being ground out by the faculties of law, and they are quite useful to a point, it is generally agreed that they are not doing all that is needed to further development - at least not what the literature on alternative development¹⁷ says is needed.

As is suggested by Hobbes, when the state certifies or defines lawyers, it describes not only what *they* can and cannot do but also what *others*, non-lawyers, can and cannot do. It imbues lawyers with power and takes it away from others. One aspect of this problem is that by acquiring the certification "lawyer," the lawyers thereby obtain a monopoly over the "law-jobs" in the modern sense; that is, people who traditionally had done much that is now encompassed by the new terminology are squeezed out. The history of the American Bar's campaign against "the unauthorized practice of law" is instructive. American lawyers are very unhappy when they contemplate accountants handling tax work, realtors dealing with certain aspects of property transactions, insurance brokers advising people on how to structure their estates, even people defending themselves in court.

There is another aspect of the lawyer problem that brings to mind a post World War I, American popular song entitled "How Ya Gonna Keep 'Em Down on The Farm (After They've Seen Paree)?" Lawyers are phototropic (and "pecuniatropic") and those who have come from outlying parts of various Third World countries are usually unwilling to leave the bright lights and high fees of the big city, where they were trained, to return to the villages and rural areas to serve the needs of the people there.

Alternative Lawyers

How are you going to keep them down in the village after they've seen Nairobi? Chances are you are not—with a few exceptions. Most of the Third World is suffering from what has been described as "city bias and rural neglect."¹⁸ Until the rural areas are allocated a greater share of

17. There is a growing literature on alternative development. See, especially, DAG HAMMERKJOLD FOUNDATION, *WHAT NOW: ANOTHER DEVELOPMENT: THE 1975 DAG HAMMERKJOLD REPORT ON DEVELOPMENT AND INTERNATIONAL COOPERATION* (1975); Ghai, *Law and Another Development*, 2 *Development Dialogue* 109 (1978) and C. Dias, R. Luckham, D. Lynch & J. Paul, *supra* note 1.

18. See M. TODARO AND J. STILKIND, *CITY BIAS AND RURAL NEGLECT: THE DILEMMA OF URBAN DEVELOPMENT* (1981).

national development resources, most of those who are able to acquire a quality education sufficient to gain them admission to law and medical schools, for example, will come from the metropolitan elite. And even those lawyers, doctors and any others who, as secondary school graduates, moved from the village to the metropolis and acquired skills, are not likely to go back to serve their home communities. The dilemma, of course, is that without the aid, especially of lawyers, the rural areas will remain neglected and depleted of their most talented citizens, and as long as they remain neglected they will be unable to produce or attract lawyers and others to aid them.

I mentioned exceptions, and it is they upon whom we must count to serve as "alternative lawyers." In Kenya, where I have had most of my Third World experience, there are a few such exceptions. The most notable one is John Khaminwa, whom I use as an example. He has a distinguished background in government service and the private practice of law. He has made a point of devoting a generous part of his time to serving the disadvantaged in his upcountry home community¹⁹ and elsewhere. Unfortunately for him (and for the people of Kenya) he is a courageous man who took the duties of the lawyer more seriously than the state was willing to allow, and he was detained by the government for seventeen months, largely for concerning himself with some of the most serious obstacles to development. This is often a risk inherent in working in the sensitive areas of the law related to alternative development. Not long ago we saw a similar but even more widespread and sinister response to the Bar in Uganda, and we have seen it elsewhere. In the United States

19. Illustrative of his concern for the needs of the rural poor and of his sense of professional responsibility is the following: "Of late, I have been taking up cases in the remote parts of the country and this tends to keep me out of Nairobi for quite some time. One thing that has come more clearly, to my notice, is the urgent need of transfer of legal technology from the urban areas to the rural areas. It is interesting how so much is said about rural development in the young nations and very often very little is said about establishment of schemes like legal aid. If I can be able to spare at least one day in a fortnight I would like to set up a legal clinic in my village in Kakamega. I believe such a clinic would at least make people know what their rights are under the law. Most of the lawyers we have tend to concentrate in the urban areas and very often the ordinary person in the village has no access to these lawyers and he has absolutely no idea of his rights. Recently an incident was brought to my notice where a man died in an accident. It had never occurred to the villagers that they could threaten the government with civil proceedings as the man died in the course of employment in the government service. Although this matter was time-barred I managed to persuade the government to make an ex-gratia payment to the dependents of the deceased to the tune of Shs. 66,000.00 inclusive of costs. The outcome of this small case has opened a new legal chapter in the village as the word has spread from door to door that so and so have been paid [a] substantial amount in damages." Letter from John M. Khaminwa to the author (May 26, 1976). His service to the poor and powerless has far exceeded the usual scope of "legal aid."

one measure of the success of community legal services—one of our attempts at alternative development—is Governor, now President, Reagan's attempts to destroy them. So the state, by giving a monopoly, also retains another aspect of the power that Hobbes highlighted. The power to define involves the power to destroy. And the state uses this power too often to maintain the *status quo* for the powerful, the propertied, the profiteers.

Nevertheless, we must continue to seek ways to encourage alternative lawyers. By that term I mean those lawyers who are willing to spend at least some of their time and energies away from the big-city, high-powered, big-money, static, formalistic practice and make their services available to the urban and rural poor to help bring about "another development."

There are those who place hope on legal aid programs, and quite a number are arising in the Third World.²⁰ However, I have not encountered any successful ones in East Africa, at least not on the Western models (which, themselves have been effective mainly on a one-on-one, case-by-case basis). They are useful as far as they go,²¹ but there are some even more promising prospects.

One such prospect is the approach of an organization called Partnership for Productivity.²² It provides, free of charge, a great many services to small businesses, farmers, women's organizations and endogenous groups in a number of Third World countries.²³ Among these services are management training and basic education about legal structures, rights and processes available to the people (such as the formation of legal business structures; the handling of business and land transactions; the obtaining of credit; legal aspects of marriage, divorce, registration of births and death; etc.)²⁴ In its Kenya operation, for example, it has a full-

20. See COMMITTEE ON LEGAL SERVICES TO THE POOR IN THE DEVELOPING COUNTRIES, *LEGAL AID AND WORLD POVERTY: A SURVEY OF ASIA, AFRICA, AND LATIN AMERICA* (1974). Interesting papers on legal services in the Third World, presented at the 9th Symposium on Law and Development, November 8-11, 1984, are available from Professor Lakshman Marasinghe of the Faculty of Law, University of Windsor, Windsor, Ontario.

21. Legal aid can be most useful in the context of alternative development when it takes on the character of "impact litigation," directed primarily at government or the entrenched elites, creating a "fabric" of rights for the disadvantaged and/or creating in the disadvantaged an awareness of the utility of legal process to bring about change. See also note 18 *supra*.

22. The full name is Partnership for Productivity Service Foundation. Coincidentally, the General Manager for Kenya is another lawyer committed to the service of the disadvantaged, Charles Khaminwa.

23. They have projects in Upper Volta, Liberia, Kenya, Botswana, Honduras, Haiti, Jamaica, Dominica and the Philippines. They are about to begin projects in Malawi and Zimbabwe and have consulted in another twenty countries.

24. A group of American academics (including the author), observing development projects in

time staff attorney who actively participates in this work. It is hoped that more such organizations providing access to “alternative lawyers” will develop in the Third World. In late 1983 there was established in Nairobi a new organization, the Public Law Institute, which even in these early years of its operation shows signs of meeting similar needs.

Alternatives to Lawyers

By *Rumplestiltskinizing* lawyers we learn what it is that they do that can be useful to people who want to participate in the development process. There are many skills, services or techniques that tend to be co-opted by lawyers—at least lawyers cast in the molds received from the colonial past. The lawyers have tended to displace others who have traditionally performed such services;²⁵ in our context this is something like Gresham’s law, the bad money driving out the good, to borrow a phrase from the economists.

It is useful to learn to what extent it is possible for non-lawyers to perform some of these functions, especially when so few lawyers make themselves available to perform them in development contexts. How many law-jobs really require “lawyers” to do them? Martin Mayer, in his extremely insightful study of American lawyers, observed:

The most legal of the lawyer’s skills is his provision of security for his clients, through the documents he drafts. As the small-claims courts demonstrate, the representation of litigants is not essential to the maintenance of a legal system, and the work of negotiating and counseling came to lawyers for reasons of convenience and efficiency rather than for any virtue residing exclusively in the profession. The one necessary societal function of the lawyer—the reason why it is necessary to license lawyers and to demand that all entrants to the profession pass a bar examination—is that the lawyer writes enforceable contracts. Communal life in a modern society rests upon pieces of paper that tell people their rights, privileges, powers and immunities, duties, liabilities and disabilities. When challenged, these pieces of paper—wills, trust agreements, mortgages, deeds, certificates of incorporation, leases, agreements to purchase or to sell, warrants and so forth—must stand up. The lawyer assures that they will.²⁶

Senegal, Kenya and Malawi, generally agreed that PfP was the most successful development assistance organization that they had seen in these countries.

25. For an excellent description and analysis of those traditional processes and institutions that preceded “law” see S. ROBERTS, *ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* (1979).

26. M. MAYER, *THE LAWYERS* 42 (1966).

His reference to litigation or dispute settlement without lawyers calls to mind Tanzania's efforts to put the poor and less poor or rich on equal footing by providing forums where lawyers are prohibited,²⁷ the community dispute settlement processes in the Soviet Union²⁸ and China,²⁹ and the continued preference for unofficial mediation processes in Japan³⁰ and China³¹ in spite of (or because of?) many, many decades of the availability of litigation/adjudication process on Western models.

Even in so litigious a society as the United States, there have been attempts to seek methods of dispute settlement outside of the narrow, static and destructive model of litigation. Marriage counselors have been taking over traditional law-jobs that they can do better. They even have, on occasion, used their techniques successfully in commercial contexts.³² Many of those American academics in the movement called Critical Legal Studies have been advocating such alternative approaches to dispute settlement³³ along with techniques of community mobilization. We even hear of alternative methods of dispute settlement such as "rent-a-judge"³⁴ in California and a growing number of other states.

It is highly desirable that we seek ways of cultivating and legitimating alternative roles and techniques that need not become or remain exclusively in the co-option of lawyers. We should ask: What traditional roles, processes, or institutions can be adapted to modern use? What new ones can be devised, like the notary or the scrivener,³⁵ to state two examples.

27. F. DuBow, *JUSTICE FOR THE PEOPLE: LAW AND POLITICS IN THE LOWER COURTS OF TANZANIA* (1974) (unpublished thesis for Univ. of Calif., Berkeley) (in Univ. of Nairobi Law Library).

28. See G. FEIFER, *JUSTICE IN MOSCOW* (1965).

29. V. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* (1978).

30. See Kim & Lawson, *The Law of The Subtle Mind: The Traditional Japanese Conception of Law*, 28 I.C.L.Q. 491 (1979).

31. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF.L. REV. 1201 (1966).

32. Judge Byron F. Lindsley describes one such occasion in *Beyond The Family: Conciliation as a Judicial Technique*, 10 CONCILIATION COURTS REV. 13 (1972); excerpted in D. FESSLER, *ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT* 117-19 (1980).

33. We need not necessarily consider such approaches Marxist in spite of the extraordinary aptness of Robert Stevens' characterization of CLS' general litany as a "monocausal whine of latter-day Marxism." He coined this marvelous phrase in his luncheon address at the AALS Annual Meeting in Cincinnati, January 7, 1983.

34. A new system of settling disputes, sanctioned by law in California, Oregon, Idaho, Nebraska, New York, Rhode Island, Utah and Washington, involves the private parties' agreeing to abide by the decision of a retired judge whom they hire and to whom they present their "case" free of most of the formalism and much of the expense and publicity of the standard judicial process. See e.g., Christensen, *Private Justice: California's General Reference Procedure*, 1982 A.B.F. RES. J. 79. It has become popularly known as "rent-a-judge."

35. The judicial scrivener, who performed a non-legally-institutionalized function as early as

In the early development of Western Law, before roles had ossified or before the state attached the specific label "lawyer" (or its equivalent), much was accomplished of a "legal" sort by representatives, heads of kin groups, etc.³⁶ Can some of these roles be developed in the Third World?

I am not hopeful about the prospects of accomplishing much of this, that is, creating new para-professional roles (even though we might, incidentally, find a constructive use for law students who, for various reasons, are unable to complete their law studies³⁷ or for others with limited education).

The reason why I am not very hopeful of defining or devising roles for others than lawyers to do "law-jobs" is that the appearance of the "paralegal" in the United States was merely a result of the pressures of the market, not a need of the public. Paralegals are useful to *lawyers* because they help lawyers make money. They are now called "paralegals" (as semi-skilled medical people are called "paramedics") because these people, too, know the importance of labels. They are totally controlled by lawyers and certainly are not of use to society as *alternatives* to lawyers. Chances are that their creation will add to the cost of legal services and will neither simplify them nor make them more widely available. I would like to be wrong on this point.

But to get back to our *Rumplestiltskinizing* in case I have been less optimistic than I should be. What is a lawyer and what does he do? Louis Auchincloss, Wall Street lawyer/novelist, offered a tentative definition in the ruminations of a lawyer/character in one of his novels: "Was either he or [his partner] anything more than a clenched fist jabbed in the direction of a client's antagonist?"³⁸ An alternative definition, and one

the 15th Century in Korea, has in more recent times been brought within the formalized legal structure. For a study of the importance of this "legal representative for the masses" in the development of Korea, see J. MURPHY, L. SHI YUN, A. MURPHY, L. TAI RO, K. TAI-JOON & P. CHOONG-HYUN, *LEGAL PROFESSION IN KOREA: THE JUDICIAL SCRIVENER AND OTHERS* (1967). We are all familiar with the importance of the scriveners in the common law.

36. See R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 24-58 (1953). His account of attempts to administer justice without lawyers in the early history of the United States is instructive. *Id.* at 135-42.

37. Many Third World law teachers feel a great deal of pressure to pass even substandard students because of the large financial investment that government has in each student. I have long felt that it would be desirable to have alternative roles or careers (certified, to satisfy egos and the Hobbesian phenomenon discussed above) into which marginal students could be shunted. This would have the double effect of finding constructive use for people with limited talents as semi-skilled paralegals helpful in development and at the same time improving the quality of the Bar.

38. L. AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* 46 (1956).

that I prefer, is Lon Fuller's: "A lawyer is a man who helps people."³⁹ That was said, of course, before we discovered women (or women made us realize that they could and should be lawyers).

Helping People

One of the most encouraging developments that I have come across in the literature—in addition to the activities of organizations like Partnership for Productivity, mentioned above, and the International Center for Law in Development—is the work of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). They have held a number of "expert group meetings" exploring and reporting upon "The Use of Experience in Participation/Law and Participation,"⁴⁰ looking at the ways popular participation can be used in dispute settlement, problem solving, access to justice,⁴¹ access to government, self-help, etc. and the way people can use law, "peoples' law," and "law people," not in the formal lawyer-client or patron-client sense (which is too much like the Western-styled, professionally controlled process), but in the context of a constructive conflict having a "*reflexive* relationship with the development of the consciousness of the poor":

That is, as they begin to take exception to the process and structures which oppress them, they also begin to see what their real needs are. And a more realistic perception of one's needs encourages the development of one's sense of personal efficiency—and so of one's ability to see all kinds of possibilities for change.⁴²

And they emphasize the need to find processes, solutions and techniques specific to the particular local systems, problems, cultures, etc., ones that the *people* can use.

I find particularly interesting their use of the term "law people," as I do Clarence Dias' and Jim Paul's use of the term "legal resources."⁴³

39. Quoted in Tweed, *The Lawyer as Public Servant*, 7 PRAC. LAW. 8 (1961).

40. See *Social Problems of Low Income Groups: Some Legal Approaches*, U.N. Doc. SD/WSPLIG/9 (1981) reporting on the then-proposed ESCAP programmes; Report of the ESCAP/MARGA Institute Expert Group Meeting on the Use of Experience in Participation/Law and Participation, held at Colombo from 15 to 19 February 1982 (Mimeo 1982) (available from ESCAP) [hereinafter cited as ESCAP Report; Emrich, *Popular Participation and Law: An ESCAP Project* (Mimeo 1982) (available from ESCAP).

41. See materials cited *supra* note 40. See also Baxi, *Access, Development and Distributive Justice: Access Problems of the "Rural" Population*, 18 J. INDIAN L. INST. 375 (1976).

42. ESCAP Report *supra* note 40, at 5.

43. See Dias and Paul, *supra* note 1.

This suggests a freer, non-procrustian⁴⁴ approach to law (not just “lawyers” with the constraints that that suggests) and legal methods, avenues, facilities and so on—people actively involved in the solution of their own problems.

The ESCAP Group catalogued a number of “foci” examined in law and participation projects: “These include the effects of industrial pollution experienced by farmers and fishermen, employment conditions, land-tenure, and various kinds of displacement caused by both urban and rural infrastructure development and technology change.”⁴⁵

Not long ago I observed similar projects in Kenya (some facilitated by Partnership for Productivity) and in Malawi. I saw that one of the most important roles that “law people,” in the widest possible sense of that term, can play is to help the local people perceive their needs and organize *themselves* to meet their needs whether this be through appeal to (or pressure on) the government, self-help or, as is usually the case, a combination of these. A classic example of this is the creative community development (with government blessing) that preceded and accompanied the many clean water projects in Malawi.⁴⁶ One of the important political lessons learned by the organized rural poor was that the water projects were *their* projects, to be run and maintained by them and their organizations and not by the government or local elites. “Law people” can play important roles in assisting the poor to so help themselves.

The reference to local elites suggests the importance of a reminder that past emphasis on “decentralization” as a technique in alternative development is often mistaken or simplistic. Sometimes decentralization fails to help the people in the periphery because, even though it may get the central government “off the peasants’ backs,” it (1) puts effective government beyond their reach and (2) usually clears the way for local governments or local elites to step into the void, leaving the “people” no better (and perhaps worse) off.

Analogy to Public Health

Much could be accomplished if Third World governments could be persuaded to treat legal health like public health. Unfortunately, political

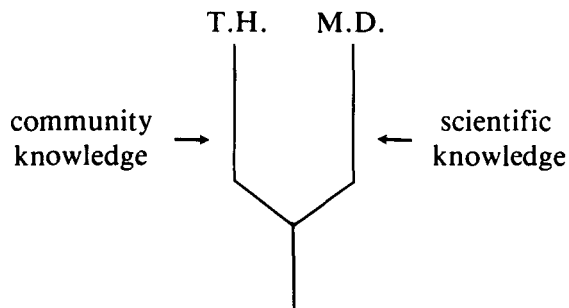
44. Along with Hobbes and Rumpelstiltskin I could have listed old Procrustes, in Greek mythology, the giant of Attica who seized travelers and tied them to an iron bedstead, after which he either cut off their legs or stretched his victims until they fitted it.

45. Emrich, *supra* note 40, at 6.

46. See J. Gus Liebenow, *Malawi: Clean Water for the Rural Poor*, American Universities Field Staff Report 1981/No. 40.

elites feel more threatened by a climate in which people enjoy access to justice and legal process than one in which they enjoy good health.

Assuming that such governments could be brought to realize the error of their views, something might be learned from the considerable success being achieved in delivering health services in rural Malawi. There the Ministry of Health approaches health "as the complete state of the person, family and community" and sees it to be the Ministry's duty to "raise the general level of health," through an infrastructure and a variety of methods, including the assistance of the community in the remote areas to look after itself by using family members, traditional healers, and traditional methods. Dr. G. W. Lungu of the Ministry of Health has said that the goal of the Ministry and the scientific medical professionals is to try to assist and improve on what the *community* is already doing. The assumption is that the community knows what it is doing and what its needs are but must be assisted. This is the focus on primary health care. The community must be helped (1) to increase its awareness of its problems and what it can do and (2) to know what to refer to the "professionals," that is, health posts, health sub-centers and on up to district hospitals. He pointed out that "the community has stored knowledge, and the formal medical community must learn from them." Most impressive was his description of the interaction between the traditional healer (alternative doctor?), using community knowledge, and the M.D., using scientific knowledge. He used the model of the tuning fork:



"Both must vibrate together."⁴⁷ The lesson for the legal profession is obvious.

47. The quotations and diagram are from a lecture by Dr. G. W. Lungu, Assistant Deputy Chief Medical Officer, Malawi Ministry of Health, on July 15, 1982 at the Kamuzu College of Nursing of the University of Malawi.

Conclusion

So what is the crux of these somewhat random comments about lawyers, alternative lawyers and alternatives to lawyers? It is that lawyers, in the sense that we are used to thinking about them, are very helpful up to a point, and I need not cite all the literature of the last twenty years dealing with this.⁴⁸ But it is more important to train lawyers as facilitators in the use of legal resources and alternative development strategies (again I refer you to the work of Clarence Dias and Jim Paul)⁴⁹ and community organizers and mobilizers of people,⁵⁰ for people mobilized are more effective than lawyers and courts who, because defined by the state, can be frustrated and intimidated by the state. As I said before, the power to define involves the power to destroy.

The job for us academics is to encourage the necessary developments in professional socialization⁵¹ and legal education⁵² in order to produce "a new breed of lawyers,"⁵³ ("parapeople" one might say), interested in

48. Two short analyses that touch on quite a few of the salient points are: W. Friedmann, *The Role of Law and the Function of the Lawyer in Developing Countries*, in *LEGAL THEORY* 429-35 (5th ed. 1967); Hager, *The Role of Lawyers in Developing Countries*, 58 *A.B.A.J.* 33 (1972).

49. See Dias and Paul, *supra* note 1.

50. See Hollnsteiner, *Mobilizing the Rural Poor Through Community Organization*, 27 *PHILIPPINE STUD.* 387 (1979).

51. Alexis De Tocqueville, writing about lawyers in the United States, said, "Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society." 1 *DEMOCRACY IN AMERICA* 276 (P. Bradley ed. 1945). Of these "interests" he said, "They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people." *Id.* at 273-74. All the more troublesome is the situation in the Third World when a large share of the lawyers come from the privileged classes. Of course, not all do. Various techniques of socialization of law students have been tried. Tanzania, feeling the need for students to acquire some political and social orientation, has required that its students spend a significant amount of time (without specifically-set limits) working in Ujamaa villages or at some other service to the society prior to admission to the study of law or any other academic subject. Ethiopia, before the revolution, required two years of pre-legal university-level education. It is probable that they were "socialized" or sensitized more through extra-curricular student political clubs, etc. (in ways that the Emperor never wished) than in classrooms, however. A number of countries have toyed with the technique of *post*-graduation national service, Eighth Annual Symposium on Law and Development, "Alternative Lawyers in the Strategies for Alternative Development," at the University of Windsor (Ontario) Faculty of Law, March 24-26, 1983. It is produced here with the permission of Symposium organizers, who will publish the original paper in the Symposium Proceedings and who retain all rights.

52. One small attempt is Hiller, *Reconstructing Law Teaching Programmes in Developing Countries*, 11 *E.A.L.J.* 69 (1975).

53. See Dias and Paul, *supra* note 1, at 372. Perhaps we should not worry as Professor Gower does (see L.C.B. GOWER, *INDEPENDENT AFRICA: THE CHALLENGE TO THE LEGAL PROFESSION* 103-04 (1967)) about training too many lawyers. Maybe we need *more* lawyers so that there will be more

law reform and public service; and to conduct research relevant to the development of law and participation processes. As to research priorities, I cannot state it better than did K. R. Emrich, Social Affairs Officer of ESCAP:

[T]he role of research in the development of law and participation process is not easily specified. Clearly action research must be the core activity. There is, however, some scope for more traditional kinds of research. One area of particular importance is that concerning the interaction between formal systems and traditional techniques for dealing with conflict. Characteristically the latter have simply been swept aside as, usually colonial, legal systems were imposed. This has facilitated the manipulation of the poor by those expert in the use of the new systems.

Traditional techniques do not simply disappear though. They often linger as a part of ineffective resistance by, for example, small holders, to modernizing processes. It is possible to conceive of strengthening these techniques by giving them a legitimate place in a synthesis of old and new, a synthesis of state law and people's law, to use common terms. A little research has been done in this area, but much more is needed. All too often, we find that we do not know either what has happened in any detail, or what possibilities exist for developing new syntheses. Research in this area would perhaps provide a set of possibilities to be explored in the development of participative processes. At the very least, I would caution against naive assumptions about the compatibility of the old and the new.

Research is also needed to develop information and training techniques, or to adapt existing techniques to specific situations. For example, people need assistance to learn to see personal problems as reflections of structural relationships; they must at least have some basis for weighing the efficacy of individual as against organized group responses. Successful techniques, and particularly good problem descriptions, must be presented in formats which are suitable for those with a low level of awareness and/or minimal education. And training techniques which are responsive to information presentation must be developed.⁵⁴

To return to my theme, he seems to suggest that we *Rumplestiltskinize* the formal "lawyer," "law" and "legal systems" and find alternatives, legal and other resources, with which to invest the poor to promote reflexive development processes and dialogue from below.

than the metropolis can absorb, making more available to the rural poor in other than formalistic legal roles. If there are only a few lawyers, only the rich and powerful will have them.

54. Emrich, *supra* note 40, at 6-7.

