"LAWYERS" IN CLASSICAL HINDU LAW

LUDO ROCHER
University of Pennsylvania

THE CONTROVERSY

THERE CAN BE NO DOUBT that parties to a lawsuit in ancient Hindu law had a right to be represented by other persons. The question arises whether or not the representatives referred to in the ancient texts correspond to the pleaders, advocates, vakils or attorneys of modern India. In other words, did ancient Hindu law have the kind of legal procedure in which the rights of the parties were safeguarded through the services of a class of experts, as is the case in present day India and in most other modern legal systems?

Looking at Hindu law as it became known to the West in the latter half of the 18th century, it did indeed seem as if the question was to be answered in the affirmative. Halhed's *Code of Gentoo Laws* (1777), translating the *Vivadarnavasetu,* did have a section (ch. III, § II) explicitly called "Of appointing a vakeel (or attorney)." Its contents are as follows:

> If the plaintiff or defendant have any excuse for not attending the court, or for not pleading their own cause, or, on any other account, excuse themselves, they shall, at their own option, appoint a person as their *vakeel;* if the *vakeel* gains the suit, his principal also gains; if the *vakeel* is cast, his principal is cast also.
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> In a cause where the accusation is for murder, for a robbery, for adultery, for eating prohibited food, for false abuse, for thrusting a finger into the *pudendum* of an unmarried virgin, for false witness, or for destroying any thing, the property of a magistrate, a *vakeel* must not be appointed to plead and answer in such cases; the principals shall plead and answer in person; but a woman, a minor, an ideot [*sic*], and he who cannot distinguish between good and evil for himself, may, even in such causes as these, constitute a *vakeel.*

> Except the brother, father and son of the plaintiff and defendant, if any other person, at the time of trial, should abet, and speak for either party, the magistrate shall exact a fine from him: if a brother, a father, a son, or a *vakeel*, should assist, and speak for either party, it is allowed.[1]

As we shall see below, this passage comprises most of the ancient rules connected with representation in court. If the English version gave a faithful rendering of the original Sanskrit, little doubt would remain that the present day vakil had his counterpart in ancient India. The answer to this question must, however, be left open at the moment. The only point we want to stress here is this: from the first translated Sanskrit text onward, scholars were confronted with a picture according to which ancient Hindu law had a system of pleaders similar to the one they were so familiar with in contemporary India.

Such an eminent authority as Julius Jolly went one step further, and drew a conclusion which under the circumstances was perfectly logical: "Instead of appearing in person, each party has a right to be represented at the trial; thus, even today the vakils, i. e., advocates, constitute an unusually numerous professional group in India." [2] In other words, Jolly interpreted the particular attraction on the part of contemporary Indians to the legal profession as the natural outcome of a factor that had its root deep in ancient Indian tradition. In his opinion the legal profession in ancient India was an important one, and one that attracted many recruits. In his classical treatise on *Hindu Law and Custom* Jolly does not refer to lawyers explicitly. But at least one passage of the book,[3] and several statements elsewhere (especially in his translations quoted below) clearly suggest that Jolly firmly believed in the existence of a legal profession in ancient India.

Nothing was more natural than that the ideas of the greatest European specialist on Hindu law were drawn upon by other legal historians who had no direct access to the Sanskrit sources and who used Jolly as their main authority. As a result, Jolly's opinion found its way into other Western publications dealing with Hindu law.[4]

The existence of legal practitioners in ancient India has also been maintained, quite independently of Jolly, by Indian scholars. According

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1. N. B. HALHED, A CODE OF GENTOO LAWS 93 (1777).

2. J. JOLLY, BEITRAGE ZUR INDISCHEN RECHTSGESCHICHTE. ZEITSCHRIFT DER DEUTSCHEN MORGENLANDISCHEN GESELLSCHAFT 44, at 346 (1890).

3. J. JOLLY, HINDU LAW AND CUSTOM 299 (B. K. Ghosh transl. 1928).

4. J. KOHLER, ALTINDISCHES PROZESSRECHT 20 (1891).

to K. P. Jayaswal, for instance, professional lawyers existed at least from the time of the *Manusmrti* and perhaps even earlier:

> Manu, VIII. 169, shows that professional lawyers were already in existence in the time of the Manava Code. The verse says that the people who suffer for the sake of others are witnesses, sureties and the judges, but that those who are benefited by legislation, are the king ("who gets court-fees"), the creditor ("who gets his decree"), the merchant ("the speculator who supplies money for defence to the defendant and acquires his property in return"), and the Brahmin. This Brahmin is the Brahmin who advised each party on law . . . The definition of *vidya-dhana,* with its history going back to the Dharmasutras, presupposes the existence of the profession much earlier.[5]

The viewpoint of the Indian dean of *dharmasastra* is completely different. Concerning the legal profession in ancient times, P. V. Kane says:

> An interesting question arises whether lawyers as an institution existed in ancient India. The answer must be that so far as the smrtis are concerned, there is nothing to show that any class of persons whose profession was the same as that of modern counsel, solicitors or legal practitioners and who were regulated by the State existed.[6]

However, Kane too admits that, "This does not preclude the idea that persons well-versed in the law of the smrtis and the procedure of the courts were appointed (*niyukta*) to represent a party and place his case before the court." His reasons for this restriction are mainly three. First, from a story narrated in Asahaya's commentary on the *Naradasmrti* (1. 4) "it appears that persons who had studied the smrtis helped parties in return for a monetary consideration to raise contentions before the court." Next, there are "some important rules" in the *Sukranitisara.* And, to these two arguments directly derived from the texts, is then added a general consideration: "The procedure prescribed by Narada, Brhaspati and Katyayana reaches a very high level of technicalities and skilled help must often have been required in litigation."

An equally cautious opinion has been voiced by U. C. Sarkar:

> There is no sufficient indication that at the time of the Smritis there was any legal profession in the modern sense of the term. Persons versed in the science of law could give their opinion for the consideration of the king and his councillors. The system was perhaps most analogous to the Responsa Prudentium of the early Romans. The opinions of the legal

5. K. P. JAYASWAL, MANU AND YAJNAVALKYA. A COMPARISON AND A CONTRAST. A TREATISE ON THE BASIC HINDU LAW 288-89 (1931).

6. 3 P. V. KANE, HISTORY OF DHARMASASTRA 288 (1946).

> experts also were not binding on the king. They had no other part to play except giving their opinion.[7]

Others were even much more outspoken. Thus, in P. Varadachariar's opinion: "It is not possible to say anything as to the existence of a legal profession in Ancient India."[8] The same author makes it a point to reject Jayaswal's above mentioned statement according to which the Brahman referred to in *Manusmrti* 8. 169 is "the Brahmin who advised each party on law":

> Mr. Jayaswal thinks that professional lawyers ought to have existed from the days of Manu or at least from the first century A. D. I find it difficult to interpret the reference to *Vipra* in Manu VIII, 169, as a reference to a "Lawyer Brahmin." The commentaries on this verse lend no support to such a reading.

We have quoted opinion about the legal profession in ancient India at some length, mainly to show the degree of confusion to which the problem has led. Various authors working on an identical set of data have been able to draw from them a number of apparently contradictory conclusions. Nothing could be more characteristic in this respect than two passages from an issue of the *Madras Law Journal.* At the yearly "Vakils' Gathering," held in Madras on April 17, 1909, the Advocate-General had this to say:

> The origin of the English Bar is shrouded in the remotest antiquity. It has been traced as far back as Edward I. Turning to the History of India, whether ancient or medieval, you find no glimpses of the existence of the legal profession. For the sake of curiosity, I looked into some of our sacred books. While you find an abundance of rules about causes of action, pleadings, plaints, written statements, burden of proof, rules of trial and judgment, you find no mention whatever of arguments of Counsel.[9]

However, in a discussion of the Advocate-General's address an anonymous author makes the following statement:

> In this the learned Advocate-General would seem to have fallen into an error, and notwithstanding his statement that he had looked into the Sanskrit-books and arrived at that conclusion, we should think there is express authority in the Sanskrit-books the other way. The following passages from the Sukranitisara would clearly show that the Vakils were

7. U. C. SARKAR, EPOCHS IN HINDU LEGAL HISTORY 37 (1958).
8. S. VARADACHARIAR, THE HINDU JUDICIAL SYSTEM 156 (1946).
9. MADRAS L. J. 201 (1909).

not unknown in ancient or medieval India as the Advocate-General would seem to think.[10]

And he adds an English translation of a number of verses from the *Sukranitisara,* to which we shall return below.

We shall now examine the original data. It is hoped that the mere presentation of these data will demonstrate how the opinions cited above could come to be held. We apologize to those readers who are not familiar with Sanskrit. In each case we shall have to start from the original Sanskrit text, to show how these texts lend themselves to different interpretations according to the general context in which one is willing to place them. Finally we shall add a few general remarks and draw conclusions which, it is hoped, will help to place the problem in its correct perspective.

The Textual Data

Narada

A first point to be noted is that representation in a law court is not referred to before the *Naradasmrti.* Truly enough, the earlier texts on *dharmasastra* are not very explicit with regard to law in general and legal procedure in particular. This absence of explicit data allows of a twofold interpretation. Either representation did exist from an earlier time, but Narada was the first one to mention the institution explicitly, or representation did not exist before Narada. We prefer not to go beyond presenting the alternatives. Tentatively, in view of the silence of Manu (like Varadachariar, we cannot follow Jayaswal's interpretation of Manu 8. 169) and of Yajnavalkya we lean slightly toward the latter alternative.

In the *Naradasmrti* we are faced with two *slokas* which definitely refer to representation in the court. The first verse (Introduction 2. 22) is as follows:

arthina samniyukto va pratyarthiprahito 'pi va
yo na bhrata na ca pita na putro na niyogakrt

In Jolly's translation this means:

If one deputed by the claimant, or chosen as his representative by the defendant, speaks for his client in court, the victory or defeat concerns the party [himself and not the representative].[11]

10. *Id.* at 153.

11. J. Jolly, The Minor Lawbooks 29 (Sacred Books of the East 33, 1889).

This is another piece of evidence of Jolly's belief in the existence of a class of lawyers. The words "for his client" are nowhere present in the Sanskrit text; literally the latter says: "for somebody" or "for him," referring thereby to the claimant and the defendant. On the other hand, it is clear that reference is made in the text to two persons who carry on litigation for two other persons, the decision binding the latter and not the former: (1) one who is *samniyukta* by the plaintiff, and (2) one who is *prahita* by the defendant. Both terms are clear without being precise; they refer to persons "appointed," "proposed" by either party.

The second stanza of Narada (Introduction 2. 23) is this:

yo na bhrata na ca pita naputro na niyogakrt
pararthavadi dandyah syad vyavaharesu vibruvan.

Jolly translates:

> He deserves punishment who speaks in behalf of another, without being either the brother, the father, the son, or the appointed agent; and so does he who contradicts himself at the trial.[12]

As in the preceding verse—*yo yasyarthe vivadate*—here too, reference is made to "somebody stating the affair of another" or "somebody speaking for another" (*pararthavadin*). Moreover, among the eventual *pararthavadins* figure: the father, the son, the brother, and the *niyogakrt*. The latter especially is important for our purpose. Jolly, in the light of his idea referred to above, translates: "the appointed agent." We do not dare to go so far, but we do notice that *niyogakrt* ("he who performs *niyoga*") derives from the same verbal root preceded by the same preverb which we already met with in the preceding *sloka:* there it was *samniyukta,* here it is *niyogakrt.* The only, but important, conclusion to be drawn from this is that, according to Narada, a party could give to another person a *niyoga* ("appointment") to speak for him in the court.

Unfortunately, nothing allows us to draw any more specific conclusions. Both verses apparently go together and deal with the same topic, but they have no contextual relation either with the preceding or with the following *slokas.* We would venture to say, with S. Varadachariar, about the first verse: "Such a declaration would be uncalled for if the passages were to refer to a professional class whose profession itself was to represent others." [13]

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12. *Id.*
13. VARADACHARIAR, *supra* note 8, at 157.

Before proceeding we must raise an objection to Jolly's translation of the second *sloka,* especially to his final words: "and so does he who contradicts himself at the trial." There is nothing in the Sanskrit text to warrant the inclusion of the conjunction "and"; on the contrary, the grammatical subject of *vyavaharesu vibruvan* is the same as that of *pararthavadi.* However, it is not easy to propose a more correct translation than Jolly's; the point is that *vibruvan* can have two different meanings which give equally different meanings to the verse as a whole. And since no argument can be drawn from the context, the only valid treatment of the passage is to mention both interpretations. Both have found their adherents among the later commentators, but it is not, and never will be, possible to know with certainty, which interpretation was the original one. In the first place, it is possible that the preverb *vi* radically changes the meaning of *bruvan* ("speaking"), so that *vibruvan* means: "speaking wrongly, speaking untruthfully, lying." We ourselves have been tempted by this interpretation, and, when the verse occurred in the *Vyavaharacintamani* (78), we translated: "He who makes false statements in legal procedures while pleading the cause of another person, should be punished, except when he is [the party's] brother, father, son, or express deputy." [14]

We still hold that this is a valid interpretation. However, after having examined the materials which serve as a basis for the present paper, we would prefer terms that are less precise than "pleading the cause" and "express deputy." In any case the verse then indicates that there are two classes of "persons speaking for somebody else," those explicitly enumerated and all others; the former may make false statements in the court without being punished, the others may not. In the second place, it is also possible that the preverb *vi* does not change the meaning of *bruvan; vibruvan* then simply means "speaking." In that case the verse prescribes punishment for anybody who speaks in lieu of a party to a lawsuit, except for the brother, father, son, and *niyogakrt.*

Brhaspati

The *Brhaspatismrti* (1. 142) in its turn contains at least one *sloka* connected with representation:

apragalbhajadonmattavrddhastribalaroginam
purvottaram vaded bandhur niyukto 'nyo 'nyatha narah.[15]

14. L. Rocher, Vacaspatimisra's Vyavaharacintamani 168 (1956).

15. K. V. Rangaswami Aiyangar, Brhaspatismrti (Reconstructed) 23 (Gaekwad's Oriental Series 85, 1941).

Jolly translates:

> For one timorous, or idiotic, or mad, or overaged, and for women, boys, and sick persons, a kinsman or appointed agent should proffer the plaint or answer [as his representative].[16]

Again Jolly uses the term "appointed agent," this time to render the Sanskrit term *niyukta.* We on our side merely notice the use of *niyukta,* a variant form for Narada's *samniyukta* and *niyogakrt.*

Brhaspati's stanza raises, however, a number of questions which are important if one wants to understand what he meant by *niyukta.* First, Jolly's translation omits one word from the Sanskrit text: *'nyo* ("other"). Since we no longer have access to the original context, we cannot a priori reject either of the following interpretations: (1) a kinsman, or another man who is *niyukta, i. e.,* either a kinsman or somebody who is not a kinsman but a *niyukta;* (2) a kinsman or another *niyukta, i.e.,* anybody who had been *niyukta* by the party. In the former alternative *niyukta* might eventually refer to a specific class of representatives; in the latter alternative it could mean no more than "designated" generally.

A second problem raised by Brhaspati's text is connected with a variant reading found in the *Vyavaharacintamani* (no. 74 of our edition) and in the *Viramitrodaya* on *Yajnavalkyasmrti* 2. 6. Here the second line reads: *purvottaram vadet tadvad aniyukto 'thava narah.* That means: "In the same way even a person who has not been deputed may speak first or last for . . ." In this case too, *aniyukta*—and, for that matter, *niyukta*—comes closer to the general "designated" than to the technical meaning of an "appointed agent."

Katyayana

Of all *dharmasastras,* the *Katyayanasmrti* seems to have been most prolific in connection with representation. P. V. Kane[17] collected no less than seven *slokas* on the subject; in his translation[18] he arranged them under the title "Substitutes or recognised agents of parties."

The first two distichs (Katyayana 89-90) are as follows:

samarpito 'rthina yo 'nyah paro dharmadhikarini
prativadi sa vijneyah pratipannas ca yah svayam.
adhikaro 'bhiyuktasya netarasyasty asamgateh
itaro 'py abhiyuktena pratirodhikrto matah.

16. JOLLY, *supra* note 11, at 288.
17. P. V. KANE, KATYAYANASMRTI ON VYAVAHARA (law and procedure) 14-15 (1933).
18. *Id.* at 133-34.

Kane translates:

> A person though other [than the defendant,] if put forward by the defendant before the judge [as defendant] should be regarded as the defendant and he also who is accepted [by the plaintiff] himself [as the defendant]. It is the right of the person charged [to give a reply] and not of another person, since the latter is unconnected [with the dispute]; [but] even a stranger may be allowed [to have the right to defend] if he is put forward [as the defendant] by the person charged [by the plaintiff].

These verses, the original of which is lost, present a number of variant readings in the later commentaries in which they have been quoted. Several Sanskrit words are problematic and might be given different translations from those proposed by Kane. A detailed discussion of all these problems is not relevant here. We must, however, remark that the words "a stranger" used by Kane are definitely too precise and too strong; the Sanskrit words *itaro 'pi* say nothing more than "even another person" without any further specification.

Katyayana 91 does not present any new problem: it corresponds word for word with Narada (Introduction 2. 22). In view of Varadachariar's remarks quoted above, we can hardly agree with Kane's statement that "this verse contains the germs of the modern profession of pleaders." [19]

Katyayana 92 reads as follows:

dasah karmakarah sisya niyukta bandhavas tatha
vadino na ca dandyah syuh yas tv ato 'nyah sa dandabhak,

i.e., in Kane's translation:

> Slaves, menials, pupils, persons deputed, and relatives, these should not be punished when they speak [on behalf of another, their master, etc.]; any one other than these [if meddling in litigation] deserves punishment.

Here we have a clear enumeration of those who may represent a party: (1) *dasah*, (2) *karmakarah*, (3) *sisyah*, (4) *niyuktah*, and (5) *bandhavah*. Thus, a *niyukta* is a specific kind of representative (*vadin* or *prativadin*), along with slaves, menials, pupils, and relatives; all others are excluded.

Katyayana 93-95 deal with the same subject:

19. *Id.* at 133.

brahmahatyasurapanasteyagurvanganagame
anyesu catipapesu prativadi na diyate;
manusyamarane steye paradarabhimarsane
abhaksyabhaksane caiva kanyaharanadusane
parusye kutakarane nrpadrohe tathaiva ca
prativadi na datavyah karta tu vivadet svayam.

Kane's translation is as follows:

> A representative [of plaintiff or defendant] is not allowed in [charges of] brahmana murder, drinking wine, theft, sexual intercourse with the wife of an elder [incest] and in other grave sins. A representative should not be given in man slaughter, theft, indecent assault on another's wife, eating forbidden food, kidnapping of a maiden and intercourse with her, harshness . . ., counterfeiting coins and measures, and also in sedition; but the man himself [the plaintiff or defendant] should engage in the dispute.

The interesting point here is that all representatives (*prativadin*), *i.e.*, including the *niyukta,* are excluded in a number of specific lawsuits. The nature of these lawsuits may have its importance for our conclusions; we shall return to it below.

Vyasa

One of Vyasa's *slokas* comes very close to the one by Brhaspati quoted above:

kulastribalakonmattajadartanam ca bandhavah
purvapaksottare bruyur niyukto bhrtakas tatha.

Although this stanza does not seem to have been particularly popular with the commentators (it occurs only in few medieval compilations), it provides us with a new element: the payment of the representative. Unfortunately, again two interpretations are possible. The representatives "who may speak up for women of good family, children, madmen, idiots, and disturbed persons, concerning the plaint and the defense," are either *bandhava* ("a relative"), *niyukta* whom we have met with above, and *bhrtaka* ("a person receiving a remuneration"), or *bandhava* ("a relative"), and *niyukto bhrtaka* ("an appointed person who receives a remuneration"). In the latter case the relative, who is unpaid, is opposed to the *niyukta* who earns a salary. In our view the more faithful interpretation is: a relative, a *niyukta,* and a *bhrtaka.* In that case we do not learn anything new about the *niyukta,* and about the term *bhrtaka* we can merely say that it is connected with *bhrti* ("salary").

Pitamaha

Finally, we must mention two verses by Pitamaha:

pita mata suhrd vapi bandhuh sambandhino 'pi va
yadi kuryur upasthanam vadam tatra pravartayet;
yah kascit karayet kimcid niyogad yena kenacit
tat tenaiva krtam jneyam anivartyam hi tat smrtam,

which were thus interpreted by Scriba:

> The king should conduct a lawsuit when the father, the mother, a friend, a relative, or a servant appear [as representatives].
>
> Whenever somebody appoints another person to act in his behalf, it is as if the act was done by himself, and it cannot be annulled.[20]

The first *sloka* is unambiguous: the king should allow a party to be represented by his father, mother, friend, or relative. But the second stanza, following after the first, again allows various interpretations. Either it means that any one *of those referred to before,* when acting through *niyoga,* acts in the other person's name. Or it indicates that anybody speaking for anybody else through *niyoga* is his real representative. In that case, *niyoga* does not refer to an "appointment" given to a specific class of representatives, but it suggests that anybody can be anybody's *niyukta.*

Commentaries and Nibandhas

Pitamaha's verses conclude our survey of the available materials on representation as far as the ancient *dharmasastras* are concerned. To these we might now add the medieval materials drawn from the commentaries and *nibandhas.* However, after a careful examination of the Sanskrit texts, we decided not to include these materials, since they do not add any really new data to those already discussed. None of the commentaries or *nibandhas* quotes *all* relevant passages from the older treatises. Even those that cite most of them try to adapt them into a coherent system, a task that was not easy and that led to highly varied results. Inasmuch as we have tried to provide all possible interpretations for the *dharmasastra* passages we are confident that we have included all interpretations proposed by the commentators. The latter would be important for our purpose only if they showed a definite development

20. K. Scriba, Die Fragmente des Pitamaha. Text und Uebersetzung (1902).

in one direction or another, *e.g.*, in the direction of gradual recognition of real lawyers. This is not the case; here as elsewhere the commentators did not aim at introducing any novelties. Their sole purpose was a correct interpretation of the ancient texts as such.

Arthasastra

Instead of quoting from the commentaries and *nibandhas*, we shall briefly refer to two *arthasastra* passages. Kautilya has no reference at all to representation in the court. The only text which is partly relevant is this (3. 20. 22):

devabrahmanatapasvistribalavrddhavyadhitanam anathanam
anabhisaratam dharmasthah karyani kuryuh,

i.e., in R. P. Kangle's translation:

> The judges themselves shall look into the affairs of gods, Brahmins, ascetics, women, minors, old persons, sick persons, who are helpless, when these do not approach [the court].[21]

This faithful rendering makes it clear that Sternbach went too far when, in connection with this text, he spoke of the judges as "official legal advisors."[22]

The situation is completely different in the *Sukranitisara*. Here we are provided with a long passage dealing with representation in the court. In G. Oppert's edition (Madras 1882) the text runs as follows:

vyavaharanabhijnena hy anyakaryakulena ca
pratyarthinarthina tajjnah karyah pratinidhis tada. (4. 5. 108)
apragalbhajadonmattavrddhastribalaroginam
purvottaram vaded bandhur niyukto vathava narah. (109)
pita mata suhrd bandhur bhrata sambandhino 'pi va
yadi kuryur upasthanam vadam tatra pravartayet; (110)
yah kascit karayet kimcin niyogad yena kenacit
tat tenaiva krtam jneyam anivaryam hi tat smrtam. (111)
niyogitasyapi bhrtim vivadat sodasamsikim
vimsatyamsam tadardham va tadardham ca tadardhikam; (112)
yatha dravyadhikam karyam hina hina bhrtis tatha
yadi bahuniyogi syad anyatha tasya posanam; (113)

21. R. P. KANGLE, THE KAUTILIYA ARTHASASTRA, PART II 293 (1963).
22. L. STERNBACH, JURIDICAL STUDIES IN ANCIENT HINDU LAW, PART I 324-25 (1965).

dharmajno vyavaharajno niyoktavyo 'nyatha na hi
anyatha bhrtigrhnantam dandayec ca niyoginam. (114)
karyo nityo niyogi na nrpena svamanisaya
lobhena tv anyatha kurvan niyogi dandam arhati. (115)
yo na bhrata na ca pita na putro na niyogakrt
pararthavadi dandyas syad vyavaharesu vibruvan. (116)
manusyamarane steye paradarabhimarsane
abhaksyabhaksane caiva kanyaharanadusane; (119)
parusye kutakarane nrpadrohe ca sahase
pratinidhir na datavyah karta tu vivadet svayam. (120)

B. K. Sarkar's translation of verse 108 reads:

> Representatives have to be appointed by the plaintiff and defendant who do not know the legal procedure or who are busy with other affairs.[23]

One important word in the text remains untranslated: the representative should be *tajjna* ("knowing it"). It is tempting to have *taj°* ("it") refer to *vyavahara* ("legal procedure") in the first line, and to say that whenever a party is not an expert on legal procedure he should be represented by a person who is an expert on such matters. If this is the case, the verse comes very close to describing a class of professional lawyers. Sarkar himself must have had this in mind when he added the following note to his translation: "Pleaders and lawyers are to represent such persons and state their cases as their own." However, we cannot accept that *taj°* refers to *vyavahara*. From verse 118, in which a son is to be accepted as a representative of his father on the condition that he is *tajjna* ("knowing it"), it is clear that *tajjna* means "knowing the circumstances of the case." In other words, the representative, to be acceptable, must have known the party whom he represents intimately enough to be fully aware of the circumstances in which the contested activities took place. This element will be an important one in our conclusions below.

Verses 109, 110 and 111 bring nothing new; apart from a few insignificant variant readings they are identical with the passages from Brhaspati and Pitamaha quoted above.

Much more important are the following four verses (112-115). This is Sarkar's translation:

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23. B. K. Sarkar, The Sukraniti (Sacred Books of the Hindus 13, 1914).

The lawyer's fee is one-sixteenth of the interests involved (*i.e.*, the value defended or realised).

Or the fee is one-twentieth or one-fortieth, or one-eightieth or one hundred and sixtieth portion, etc.

Fees ought to be small in proportion as the amount of value or interest under trial increases.

If there be many men who are appointed as pleaders in combination they are to be paid according to some other way.

Only the man who knows the law and knows the Dharma should be appointed [as pleader].

The king should punish the pleader who receives fees otherwise.

The pleader is to be appointed not at the will of the king.

If the pleader acts otherwise through greed he deserves punishment.

The only problem in these verses is the expression "who receives fees otherwise" in 114. Sarkar duly states the two possibilities in a note to this translation: "He may be punished if he takes exorbitantly or if he practices without knowing the law, etc." After what has been said in the former half of the stanza, we would be inclined toward the second alternative, with Kane: "if the representative takes wages without knowing these." [24] However, the first alternative should not be excluded either: if 112cd-114ab are a more recent insertion into the text (we shall return to this in our conclusions), the latter part of 114 originally belonged together with the former part of 112. In that case "otherwise" means: "otherwise than one sixtieth part."

Verse 116 is identical with Narada's Introduction 2. 23, and verses 119 and 120 correspond to Katyayana 94-95.

Besides the points which we had become familiar with from the *dharmasastras*, we do find in the *Sukranitisara* a number of new and interesting elements: (1) representatives are appointed by parties who are *vyavaharanabhijna* ("who do not know the rules of legal procedure"); (2) the payment of the *niyojita* or *niyogin* is dealt with in great detail; (3) the *niyogin* is to be appointed by the party, not by the king. It hardly needs to be recalled that these elements played an important part in some of the opinions of modern scholars, quoted in our introductory remarks.

24. KANE, *supra* note 6, at 158-59.

Interpretation

As indicated at the outset, the principal reason for raising the question of the existence of lawyers in ancient India was the awareness of the existence of such a professional class in modern Indian law, and in Western law as well. Consciously or unconsciously, the general background of the investigations on ancient Hindu lawyers—as of many other aspects of research on Hindu law—has been one of defensiveness. Was it possible that such a wonderful legal system as the one depicted by *dharmasastra* did not include the institution of legal practitioners?

An excellent example of this tendency to look for "the germs of the modern profession of pleaders" is P. V. Kane who, notwithstanding his admirably sound approach, when translating Katyayana 91, could not withhold from adding the note cited above. Even Judge S. Varadachariar, who completely denies the existence of a legal profession in ancient India, unwittingly takes up the defense of Hindu law. He cites examples of various other ancient legal systems that did not know a legal profession either. The underlying idea is that we should not really be surprised if ancient Hindu law had no lawyers, since contemporary systems were not more advanced. Characteristically, the enumeration of the other legal systems ends with the following statement: "In England there was no definite legal profession till more than a century after the Norman conquest." [25]

Our approach to the problem is completely different. We maintain that such an apologetic attitude is not at all necessary. In our opinion, the ancient Hindu legal system was such that a legal profession not only did not exist, but that it was not called for and hardly could have existed. The reasons that led us to assume that a legal profession did not exist in ancient India are at least three in number.

First, the only term which might eventually have referred to professional lawyers was *niyogin, niyukta,* or *niyogakrt.* We are not much concerned about the fact that there is no uniformity of nomenclature. There are other examples of well established institutions in ancient Hindu law which did not enjoy a uniform terminology. But we are concerned about the fact that not a single text on *dharma* pays any special attention to the *niyukta* as such. If he had been an important and constant element of the law court, we may be assured that some *dharmasastra* would have elaborated on the qualifications to become a *niyukta—e.g.,* under the heading *niyuktaguna*—and on the disquali-

25. VARADACHARIAR, *supra* note 8, at 158-59.

fications which would have prevented a person from entering the profession. All participants in a lawsuit have been duly enumerated and described in the texts; the authors of the *dharmasastras* would have fallen short of their duty if they had not paid attention to one of these participants, the "lawyer."

Secondly, if the main purpose of *niyoga* had been a more effective presentation of the party's interests than he could normally provide himself, we do not see why *niyoga* was so fiercely opposed in what we may call major criminal cases.[26] Katyayana's three *slokas* (93-95) which deal with this aspect of the problem seem to indicate that, when it came to really serious cases, *niyoga* was prohibited. From this we must infer that *niyoga* was allowed only as long as the case was a less serious one. Whenever a party was unable or unwilling to appear in person, he was allowed to be represented by another person in minor cases; but he had to appear personally in major issues. Such a criterion is hardly compatible with the role of a professional legal adviser as we conceive it today.

This second argument leads us to a third, namely, the existence of a class of professional representatives was not called for in Hindu law. This argument is undoubtedly the most important and most basic one. Administration of justice in ancient India was the concern of the king; it was part of *rajadharma.* Several rules in the *dharmasastras* lay down that the king is responsible for punishing those who deserve to be punished. But it is added that the king is also responsible for the innocent not to be punished. Thus, *e.g.*, Manu 8. 126-128, in G. Buhler's translation:

> Let the [king], having fully ascertained the motive, the time and place [of the offence], and having considered the ability [of the criminal to suffer] and the [nature of the] crime, cause punishment to fall on those who deserve it.
>
> Unjust punishment destroys reputation among men, and fame [after death], and causes even in the next world the loss of heaven; let him, therefore, beware of [inflicting] it.
>
> A king who punishes those who do not deserve it, brings great infamy on himself and [after death] sinks into hell.[27]

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26. L. Rocher, *Ancient Hindu Criminal Law*, 24 J. ORIENTAL RESEARCH MADRAS 15-34 (1955).

27. G. BUEHLER, THE LAWS OF MANU 276 (Sacred Books of the East 25, 1886).

That means that the only person in the court who is responsible for the party's interests being safeguarded is the king, or, in practice, the king's representative: the chief judge. The fact that the parties might not be *vyavaharajna* ("acquainted with legal procedure") and hence unable to defend themselves properly, was no reason why they should be assisted by professional lawyers. The person responsible for the correct course of the case and for safeguarding the parties' interests was the king himself or whoever presided over the court in his name. It is in the light of these considerations that we must also understand the passage from Kautilya quoted above: parties who are unable to appear in person need not, therefore, be represented; the king himself is responsible for their interests.

So, as we see it, professional lawyers did not exist and could hardly have existed. To this we now want to add a restriction. As it so often happens in ancient Hindu law and in Hindu civilization generally, in the case of legal representation too, a certain degree of development must have taken place in the course of the centuries. We are not among those who believe that the more recent *dharmasastras* were composed with the intention to innovate and depart from what had been said by the older ones. On the contrary, we are convinced that the more recent authors tried their very best to maintain the general scheme laid out by their predecessors. But in the meanwhile the actual situation did change, and every now and then authors of more recent *dharmasastras* could not prevent themselves from reflecting some of these changes.

Thus, we believe that at an early date—let us roughly say at the time of the *dharmasutras*—professional lawyers or, to be more precise, specialized *dharmasastrins* could not exist. The Indian sage in those days was a specialist in all of the texts related to a particular Vedic school. His specialized knowledge concentrated on a specific version of the Vedic *samhita* and all its related texts: *brahmana, aranyaka, upanisad, srautasutra, grhyasutra, dharmasutra,* etc. There were no specialists on *dharmasastra,* and, a fortiori, no specialists on law that were part of it.

But the situation changed. The texts on *dharma* grew away from the Vedic schools. Gradually there may have come into being a specialized group of learned men whose main interest was *dharma,* and the various *dharmasastras* as such.

Finally, as the amount of textual material increased, we may assume that certain experts, without detaching themselves completely from other

aspects of *dharmasastra* and from Hindu learning generally, accumulated a very specialized knowledge of one aspect of *dharma: vivada* and *vyavahara,* or, in modern terminology, law. It is very possible that at this stage the nature of legal representation (*niyoga*) also underwent a certain change. We do not want to exclude the possibility that, at that moment, in a number of cases legal competence played a role in the choice of a representative. We are even willing to accept that Vyasa refers to the very special circumstance in which the representative was paid for his services. However, no written source allows us to draw the conclusion that the experts on legal matters ever developed into a professional group whose regular activities consisted in representing parties in the court. The impression which we gather from the texts is that, even in cases where the representative was chosen because of his special competence on legal matters, and, a fortiori, in all other cases, the necessary condition for a person to represent a party was the existence, between the former and the latter, of a certain form of close personal relationship.

In this connection we want again to refer to the categories of *niyukta* enumerated by Narada (Introduction 2. 23): brother, father, son, and by Katyayana (92): slaves, menials, pupils, etc. Some of these terms were vague enough to be interpreted very broadly, and we can very well see how a party who wanted to be represented in the court may have tried to fit into these categories a person who knew the *dharma* rather than one who did not. But the main requisite was the personal relationship stressed by the *dharmasastras,* not the representative's legal competence.

Moreover, our point of view offers an adequate explanation for the passage from Asahaya quoted by Kane and referred to above.[28] Here again, it is true that the representative, Smartadurdhara, is said to be an expert on *dharma,* but nothing points to him as a professional lawyer. On the contrary, he is a friend of the family, and, as such, serves as their adviser. He does represent the party in court, but only after having assured the judge that he is entitled to do so because "he and his ancestors were friends of the family." In other words, he does not act as a professional expert (*vyavaharajna*) but as a personal friend (*suhrd*); the fact that the *suhrd* is *vyavaharajna* is purely coincidental.

Finally, our interpretation is also confirmed by the above quoted passage from the *Sukranitisara,* about which we want to add a few words

28. P. N. K. SAHAY, A SHORT HISTORY OF THE INDIAN BAR 4-6 (1931).

here. There is no doubt that, of all sources examined in this paper, the *Sukranitisara* is the one which most strongly reminds us of the modern legal profession. While commenting on it, Kane went as far as to say:

> The rules of Sukra made a near approach to the modern institution of the Bar and the fees prescribed by Sukra are similar to those allowed by the Bombay Regulation II of 1827 and by Schedule III to the Bombay Pleaders' Act (Bombay Act XVII of 1920).[29]

The main support for this statement is the detailed description of the representative's remuneration (verses 112-114). However, it has been so far overlooked that at least part of these verses (112cd-114ab), although reproduced in Oppert's edition, actually occurred in one manuscript only; they were missing in all four other manuscripts and in the printed version used by Oppert. We would not hesitate to consider them as a very recent addition to the original text. As a matter of fact, the entire *Sukranitisara,* as we have it today, is of recent origin.[30] It seems to us that it is a recent compilation, based upon a number of ancient rules—some of the verses are simply identical with those quoted from the *dharmasastras*—but into which were inserted certain very modern ideas, even ideas belonging to the colonial period. We would not be surprised if the rules about the representative's remuneration belonged to this latter category.

Under the circumstances it is all the more noteworthy, as Varadachariar puts it, "that it provides for the appointment of a 'representative' not only on the ground of the party's ignorance of Vyavahara but also on the ground of his being otherwise busy." [31] Thus, even such a very recent text as the *Sukranitisara,* which seems to have known a real professional class of lawyers and does not hesitate to incorporate it into the classical system of *dharmasastra,* does not exclude the idea that the legal representative and the person represented by him should be linked by a personal tie of blood relationship, friendship, etc. This, more than anything else, shows that this traditional element was a very important one, probably the most important of all in legal representation according to classical Hindu law.

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29. Kane, *supra* note 6, at 290.
30. M. Winternitz, Geschichte der indischen Litteratur. Band III 531 (1920).
31. Varadachariar, *supra* note 8, at 157.

CHRONOLOGICAL SURVEY OF SANSKRIT TEXTS[32]

Dharmasutras 600-300 B. C.

Dharmasastras
- Manu 200 B. C.-100 A. D.
- Yajnavalkya 100-300 A. D.
- Narada 100-400 A. D.
- Brhaspati 300-500 A. D.
- Katyayana 400-600 A. D.
- Vyasa 600-900 A. D.
- Pitamaha 600-900 A. D.

Commentaries and *nibandhas*
- Asahaya on Narada 700-750 A. D.
- *Vyavaharacintamani* 1500-1550 A. D.
- *Viramitrodaya* on Yajnavalkya 1615-1645 A. D.
- *Vivadarnavasetu* 1773 A. D.

Arthasastra
- Kautilya 300 B. C.-100 A. D.
- *Sukranitisara* ? [1800 A. D. ?]

32. KANE, *supra* note 6, at XVII-XX.