

**CRITICAL READING OF *NILABATI BEHERA V. STATE OF ORISSA*
INSPIRED BY 'APOCRYPHAL JURISPRUDENCE' BY DESMOND MANDERSON**

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Apocrypha, as put by Desmond Manderson is not a school of study that requires any intellectual coherence or political agenda. This is one of the main reasons I chose to write on this area, and will be using the post-modern, or if I shall say, the apocryphal approach to do a critical reading of a case to see how the approach to law is motivated by certain concerns. This case is a primarily landmark judgments regarding the issue of custodial violence, and will be used as a pawn to see how the mighty court approaches the law, especially when it is directed to certain subjects. I will be using the first person narrative since a lot of these are my opinions, and secondly because I as an individual am not unique, and as a legal subject, am still a construct, with the closeness to law remaining a distant dream, and with the law presenting me with glaring reminders at every stage that it is much mightier and much more powerful than I am. The apocryphal needs a shared temperament and an imagination, both of which I believe I possess, and using these, I will undertake a reading of the case, Nilabati Behara v. State of Orissa, using the text Apocryphal Jurisprudence by Desmond Manderson as inspiration.

“Before the law stands a gatekeeper. To this gatekeeper there comes a man from the country and prays admittance to the law. ...At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: “If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can’t endure even one glimpse of the third.””¹

In Apocryphal Jurisprudence, the apocrypha is largely interested in looking at law through various genres, with literature being one of them. This they believe to be aesthetic, as it deepens the engagement with legal materials. Thus, I use this portion of Kafka’s literature where he uses his writings as a tool of engagement with the law, to begin my understandings before I undertake my reading of the laws current engagement with the larger structure it is a part of. Emerging schools of Jurisprudence have various different beliefs. The Orthodox school believes law to be an unequivocal sovereign, and they usually argue from a position remembering that. The Heretics on the other hand, look at the origin

¹ Franz Kafka, ‘The Parable of the Law’, translated by Ian Johnston <<http://www.kafka-online.info/before-the-law.html>> accessed on 29th April 2017

of the law to signify its authority. In a democracy, according to their standpoint, the law is not for the people.

*“Against the illusion and disillusion of faith alike, the apocrypha offers an antidote to nostalgia named history and an antidote to despair named hope.”*²

Briefly explained, the postmodern idea of law rejects abstract foundational ideas and overarching theoretical explanations. It believes that individuals themselves are not unique and it is their experiences that shape them. They also resist conventional methods of definition, as well as reject belief or faith in science. According to them, law creates ideas and things around the legal subject, thus making the legal subject a construct. Furthermore, they see the act of interpretation as an exercise of power. However, these draw on intellectual influences and perspectives that are different, and cannot be said to be the same as Apocryphal jurisprudence.

The word ‘apocryphal’ has Biblical references (‘Apokrupto’ in the Bible means to hide), but roughly translates to mean something that despite being widely regarded as true has doubtful authenticity. In his work, Manderson tries to describe what he understands by the term. To him, an apocryphal is the circulation of stories in a culture, or to understand the lines between the idea of myth and reality. Apocrypha looks at the importance of narratives in the construction of one’s beliefs. However, there are certain drawbacks as well which he lists. Firstly, the apocrypha has no means of proving its authenticity, and thus it can be very deceptive. Secondly, he calls it fiction, which is dressed up as history. It can be seen as a limitation that texts that cannot be domesticated are excluded by the apocrypha. However, it seems about right to reiterate that just because something is hidden from simple view does not make it inauthentic.

Their approach to law is marked by certain concerns which are different from various other schools of law. They aren’t concerned with how correct the decision is, as much as they are with the implications of law. They want legal material to engage with music, literature and so on to make it more common and less distant to people. Further, for them, the reasoning of the court is not sufficient and there is an urge to go beyond that, and beyond the methodologies the Courts adopts to set a relationship for law and justice. Further they examine the arguments of the Court to see the problems that they would like to avoid.

The 1993 decision of the Supreme Court in the Case of *Nilabati Behera alias Lalita Behera v. State of Orissa and Others*³ dealt with the issue of custodial violence. On 14th September 1988, Ms. Nilabati Behera sent a letter to the Supreme Court, which the Court

² Desmond Manderson, “Apocryphal Jurisprudence” (Australian Journal of Legal Philosophy, 2001)

³ AIR1993SC1960, Manu: MANU/SC/0307/1993

treated as a writ petition under S. 32 of the Constitution of India. The contents of this letter asked for compensation for the death of her son, who suffered grave injuries which resulted to death when he was in police custody. Ms. Behera's son, Suman Behera was taken into police custody at around 8 a.m. from his house for an investigation of theft and was detained at the station. The following day, a couple of hours post noon, the petitioner was informed that her son's dead body was found at the railway tracks with multiple injuries on it, making it evident that the death was an unnatural death. Ms. Nilabati Behera alleged that this is a case of custodial violence, where her son was gravely tortured, and following his unconsciousness, his body was thrown on the railway tracks. The police officer's defence to this was that around 3a.m. at night, Suman Behera had managed to cut the ropes through which he was tied, by chewing on them, and subsequently escaped. They further went on to claim that despite a search that they conducted, they could not apprehend Suman. Their claim was that the injuries on his body were a result of him being run over by a passing train. The post mortem report of Suman Behera was relied upon to show the multitude of injuries and fractures his body had sustained, along with details of how his body was found and how many lacerations and ruptures were there, following which the doctors concluded that all the injuries seemed such as if they were given by a hard and blunt object, and did not look like injuries that a person could sustain by being run over by a train, or even by a person's body being dragged by one. After the cause of death was established, the court moved on to the issue of compensation, agreeing to pay Rupees 1,50,000 as compensation, along with compensation for legal services. This amount was calculated considering the salary of Suman Behera. When it comes to their faith in rules, the orthodox or the positivists, are in denial, whereas the Critical Scholars or the heretics are in despair.⁴ However, the apocryphal look at the impossibility of right answers in legal cases. Even in this judgment, despite the court seeing it, there are various questions that remain unaddressed, like the sheer brutality of the act of the police violence, or the horrendous nature of their lies when they themselves were the ones to put the body on the railway tracks.

The precedents that the court refers to, and also precedents laid down in general before this case differ significantly from one another, quashing one legal argument with another legal argument. The apocryphal here would not look at what is the most accepted precedent but rather which legal argument would work to solve the problem. In this instance, only half of the problem is solved through monetary aid, moreover, beyond granting compensation, the court does not delve into the barbaric actions of a force that is supposed to be the caretakers of the law, and does not seek to punish the same. This further shows the limitation of the law. In the present case a Writ Petition was filed for compensation.

⁴ Desmond Manderson, *Songs without Music: Aesthetic dimensions of law and justice*

(Berkeley: University of California Press, 2000), pp. 162-69.

The Concurring judgment of Justice A.S. Anand brings up the fact that under a Writ Petition, the court is mainly just looking at whether a fundamental right has been violated and if so how. The implications of such violations cannot just be so simple. On a simple reading one can decipher that just providing monetary compensation is not the same as serving justice, but in this judgment, the court believes the same to be true. This just means that they are trivializing a horrific act by seeing it in very frivolous terms.

The Court sees themselves as powerful and equipped and in this judgment, also as a messiah or savior of some sorts. However, the wordings of the judgment also seem to show that the court is doing some sort of a favour by granting half justice. While they do themselves see the need to “forge new tools, which may be necessary for doing complete justice and enforcing fundamental rights”, it seems like the only reason they are taking up this view is because, in the words of Justice J.S. Verma, the contrary view will show the court to be powerless. Even in this circumstance, when the court has not completely addressed the issue and served justice to Behera, by not addressing the criminal nature of the act, and prosecuting those responsible for the same, it still manages to give some sort of hope or promise that ways or methods will be created so that complete justice is rendered. Even Desmond Manderson would see through something like this as simply a message of the Courts power, where they continuously will promise future litigations, but will remain rigid and maintain authority and show an apprehension-if not a refusal- to decide. The case very clearly shows that the various burdens for accessing the law still remain, and it remains a myth that the law is there for us.

“...The man, who has equipped himself with many things for his journey, spends everything, no matter how valuable, to win over the gatekeeper. The latter takes it all but, as he does so, says, “I am taking this only so that you do not think you have failed to do anything.” ...Finally his eyesight grows weak, and he does not know whether things are really darker around him or whether his eyes are merely deceiving him.”⁵

Manderson calls the courts refusal to listen an ethical failure of responsibility. The court is under a responsibility to provide a hearing and a response to the individuals before it. If a court doesn't hear a person's case, it amounts to the abrogation of a fundamental responsibility. For the presence of a law, there should be some ethics that exceed it. If a plaintiff goes to court, they should be given the respect and the attention of an audience. While in the Nilabati Behera case, the court did end up giving a response to the letter by considering it as a writ petition; justice was not served completely since the perpetrators of the violence were not punished. Ofcourse, it is a separate question whether punishment is

⁵ Franz Kafka, 'The Parable of the Law', translated by Ian Johnston <<http://www.kafka-online.info/before-the-law.html>> accessed on 29th April 2017

of any use or not in actually achieving justice, but I believe it is, and the acts of the officers responsible for the death of Suman Behera deserve them.

India has seen a history of the use of violence in custody, starting from texts of Hindu Mythology, where both the Ramayana and Mahabharata saw regulatory mechanisms for law enforcements.⁶ The Arthshashastra has various references to torture like cutting off limbs, trampling to death by being stamped on by wild animals and so on (basically an elephant stepping on a person and squashing them). It was seen as necessary to prevent the evil or criminal influences from spreading. Custodial torture to extract confessions was widespread under the Mughal period, and stories of torture by officials are one to many when India was a colony under the British. In the post-independence period, Police Commissions have listed that torture in police stations is usually used due to political ends, corruption, lack of training or even infrastructural support. In the Nilabati Behera case, the people are abstracted from their individual experience. While the sheer intensity of the crime, which can be seen through the post mortem reports and the number of injuries listed on it, is evident; the Court still chooses not to address it in the case. They do not delve into how the very occurrence of a death in police custody is abhorrent. Rather, they solely try to establish whether it happened in police custody, and if so, what is the nature of compensation that should be given. This is more like a way of silencing people, telling them that they get some money for the wrong that happened to them, and realizing and acknowledging that a wrong happened to them, and still not doing anything about the wrong that happened.

“The apocrypha remains engaged with the tradition of ‘understanding and explaining adjudication’, albeit by explicating its difficulties and not by attempting to resolve it.”

Certain concerns come up in the Nilabati Behera case if the apocryphal approach to analyzing a case is followed, and I shall attempt to do the same. Firstly, I will attempt to look at the discourse. The apocrypha focuses on the implication of a particular law more than it does on the correctness of a decision. In the case, because of the judgment it can be established that custodial violence amounting to death can be seen as an abrogation of someone’s fundamental right and is not correct. Furthermore, this judgment also establishes monetary compensation as some kind of cure. The implication of this will simply be that if in future an instance occurs where the court grants some sort of compensation, it will be seen as achieving justice. The discourse in the case talks about the public functions of the law to assure to the citizens that their interests and rights are

⁶ See S.K. Ghosh, ‘Police in Ferment’ (1981) p.19. and Encyclopedia of Police in India, 1993.

⁷ Desmond Manderson, “Apocryphal Jurisprudence” (Australian Journal of Legal Philosophy, 2001)

preserved, and that granting compensation is a way of the state punishing themselves for not upholding this safety which was assured.

The apocryphal aesthetic uses alternative genres to deepen engagement with legal materials. Desmond Manderson uses a figure skater as an analogy for law, and how figure skating happens on ice, and without the ice there is no figure skating. However, if we shift focus to just the ice and not the figure skater, we are missing the point. It becomes important that the law is determined in the context of the adjudication, which is somewhat something the judges in this case manage to do, but without looking at the larger picture of who gets affected by the law and how.

If we will look at the tragic aspect of the apocryphal understanding, we will look at things that are beyond the reasoning of the court, and also at myths regarding the origin of law and all theories that prevent it. With respect to the Nilabati Behera case, this can be seen in the context of the evidence against the respondent, which cannot be said to be entirely fool proof or conclusive. No benefit of doubt was given to them, just in case they weren't actually lying. Law shouldn't be something that is decided on the basis of whatever principle is in operation at the point of time, like how it was in terms of compensation in the case. Such an application of law becomes very inadequate to what the person who faced the custodial violence actually experienced. Law cannot just be approached by the precedents in place or the rules currently in operation. Narratives, myths as well as psychological selves should be used as means to approach the question of power.

Looking at the ethics of law, the apocrypha believes that the relationship between law and justice can be seen in the methodology of the court. Jacques Derrida terms this as the "madness of decision."⁸ Despite the various rules that are in place, courts need to be responsible. Apocrypha is not interested in the solution to the problem of adjudication, and want to go beyond just the legal problems. In this judgment, justice seems to be served on paper, but with reminders about the mighty position of the law, and making it seem like it is doing an obligation on the people when they come before the courts, and when the courts help them out.

The last approach to law is motivated by the concern of the style of the law. The apocrypha believes that the court's arguments and their rhetoric reveals the problems that they would like to avoid. Various questions come to my mind, like why did the court delve into such a long discussion on compensation when it is a state responsibility to ensure protection of fundamental rights, and if compensation had to be given, then why did they have to do such an extensive analysis. The apocryphal approach to law focuses on some subjects more than others. The gates to law, as Kafka would put it, are hard to access even if it seems like they are open and welcoming. Justice served at face value does not in any way amount to

⁸ Jacques Derrida, 'Force of Law', p. 961.

justice completely served, and also just because there are given rules which have been put in place regarding how particular situations should be responded to does not mean that those rules are applied in isolation. Law is much more than that and cannot be seen in an abstract. The implications of how law is applied, what it means to the person to whom it is applied, and if it is actually serving any purpose also needs to be seen by the courts. Such an approach to law, I believe, will make it fundamentally more approachable and near to the people. Also it will ensure the decisions are made not just because that is the rule, or because that is what the law or precedent established over the year is, but because when placed in some sort of context, that is what the most correct decision seems to be.