Deconstruction

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Introduction

Deconstruction is a mode of philosophical thinking with which the French philosopher Jacques Derrida broke away from the traditional and dominant ways in which texts have been read and understood in the history or Western civilisation. Instead of focusing on the "ideal content" of meaning that texts evidently aimed to convey, and instead of engaging with in a debate with the author regarding this "ideal content" of the text, Derrida focused on the way in which the "material" organisation of texts complicates, relatives, destabilises and even renders contradictory their ideal content or meaning.

What was Derrida's aim with this new approach to reading and understanding texts? The brief description of Derridean deconstruction and its reception in legal theory that follows responds to this question in three steps. Section I briefly explains a number of the key concepts that Derrida developed in his early work. Section II looks at the way in which these themes or concepts found their way into legal theory. Section III then offers an assessment of the reception of deconstruction in legal theory that pays specific attention to the way in which the aim or purpose of deconstruction was understood by some of the scholars who played a prominent role in the reception. Section IV concludes the piece with an alternative assessment of the relation between deconstruction and legal theory.

I. KEY THEMES OF DERRIDEAN DECONSTRUCTION

When Derridean deconstruction burst onto the scene of 20th century philosophical thought, a number of key themes captured the imaginations of those who joined the "deconstruction movement." These key themes pivoted on, among others, the notions of "différance", "trace" and "supplement" that Derrida developed in his early work. All these themes inspired the members or followers of the movement to also acclaim Derrida's provocative assertion that "there is nothing outside the text" – il n'y a pas de hors-texte (Derrida 1967: 227; 1974: 158). Let us begin to take a closer look at deconstruction and the broad theoretical movement that it precipitated by unpacking these notions of "différance", "trace" and "supplement" together with the contention "there is nothing outside the text."

Différance denoted for Derrida two fundamental features of language. The first concerned the way in which all linguistic signs derived their ability to signify "something" (we will take a closer look at this "something" presently) from their difference with other signs. The second concerned the way the sign's ability to signify also derived from their *deferral* of the signs from which they differed. The signifying sign – the sign that signifies at a particular moment in time – signifies something because of the way it precludes other signs from signifying something else at the very same time. In other words, signification is the result of the sign's momentary ability to suspend and postpone until later any signification of other signs that signify "something"

else and can indeed be anticipated to do so again later. To give a simple example: The letters c, a and t, when spelled in this sequence signifies a particular kind of animal because of the way the signification “c-a-t” differs from other significations such as “d-o-g” or “c-o-w” that may later come to signify the different animals that they are usually taken to signify when they effectively signify something. The same can be said of the individual alphabetic letters themselves and their phonetic or sonic equivalents. We receive and register the signification “a” because we do not receive at the very same time the signification “b” or “c,” and so forth until z; we receive the signification “b” because we do not receive “a” or “c,” and so forth until “z” (see Derrida 1972: 1-29; 1982: 1-28)

This simple explication of *différance* already allows one an elementary grasp on the other two key operative terms in the early work of Derrida brought into consideration above, namely, “trace” and “supplement.” The explication of *différance* already shows how potential significations that are currently absent *leave a trace* on actual significations, notwithstanding their “absence.” “C-a-t” comes to the fore as an effective signification because of the way in which *the absence* of the “deferred” significations “d-o-g” or “c-o-w” is constitutive of this signification. “C-a-t” thus carries with it a trace or traces of “d-o-g” and “c-o-w.” The deferral of “d-o-g” or “c-o-w” (that takes place whenever we are not talking about dogs or cats) by the actual signification “c-a-t” does not make “d-o-g” or “c-o-w” disappear *without a trace*. “C-a-t” is, for that matter, also the veritable “trace” of “d-o-g” and/or “c-o-w.” A sign always figures as a trace of other signs not currently or immediately “present.” Part of our understanding of what a dog or a cat is, depends on understanding why we do not take dogs and cows as different species of cats, but as completely different species of animals. The same would of course be true if “d-o-g” or “c-o-w” were to become the currently or presently effective signifier (when, for instance, the conversation switches from cats to dogs or cows). They too would then carry or effectively *become* the traces of “c-a-t,” etc. The upshot of all this is that effective signification is as such always the effect of interlaced traces; traces that are themselves the effects of other traces, and never of something beyond or outside the trace. At no point in time does linguistic signification attain to some kind of unitary substance or presence. It never constitutes a substantive unit of meaning. Language is an interlacing play of traces of traces (see Derrida 1972: 25;1982: 24).

Derrida discovered the play of interlacing traces also to be at work in all acts of textual *supplementation*. The need to supplement a text with an appendix or addendum suggests an author’s sense that the true or accurate meaning of the main text only comes to the fore once the appendix or supplement is added. At the same time, however, the supplementation on its own only attains meaning as a supplement, that is, not on its own, but always in connection with a main text. In this way, the main text ends up being the supplement of the supplement. There is therefore no such thing as *the main text* in the end. The meaning of any text is affected and effected by its *margins*, to bring into play here another key term that Derrida would develop in his early work. The meaning or significance of any text is ultimately fundamentally conditioned by that which is either deliberately written into its

margins as a supplement (or a footnote), or that which is silently relegated to the margins for purposes of centring the main purport of the text. In the final analysis, no text is closed or enclosed. Textual meaning is never neatly enclosed within the boundaries of a text that can for this reason be presented like a finished book. On the contrary, Derridean deconstruction invites readers to also look at "finished books" as inscribed in an endless textuality or intertextuality that exposes all claims to semiotic and semantic closure – all pretensions that one is saying or signifying *this* and *nothing else* – to margins that compel one to re-include what one pretends to exclude (see Derrida 1967: 203-234; 1974: 141-164).

This more or less "standard" understanding of key themes from Derrida's early works gave rise to a new wave of literary studies that challenged well established interpretations of literary texts by exposing these interpretations to elements of the text that have hitherto always been ignored or considered less important. This new wave of literary studies soon also spread to other fields of textual studies, and legal theory was no exception. Critical legal theorists began to employ the deconstructive reading strategies of literary theorists to dig up marginalised, ignored or suppressed elements of important legal texts in order to challenge the dominant interpretations of these texts and to open the way for alternative readings that might bring about legal reform, as we shall see presently. However, before we turn to this reception of deconstruction in legal theory, let us bring into play one more aspect of the deconstructive theory or thinking that Derrida put forward in his early work, namely, his claim that "there is nothing outside the text" – "*il n'y a pas de hors-texte*."

The key insight that Derrida sought to communicate with his claim "there is nothing outside the text" was a further implication of the way in which combinations of *difference* and *deferral* – the two key elements of *différance* - constructed – and deconstructed – meaning. The notion of *différance* effectively put paid to the idea that a linguistic sign actually referred to something beyond language, that is, beyond the differing and deferring interplay of linguistic signs. The Saussurean linguistic perspective that informed Derrida's understanding of *différance* broke away from all "realistic" conceptions of the relation between a signs or *signifiers*, on the one hand, and that which they *signified*, on the other. From the perspective of the structural linguistics of Ferdinand de Saussure, the sign or signifier never relates to something beyond language. Whatever a particular *signifier* may come to signify, is an effect of the relation of signifiers with other signifiers. Signification, and all communication of meaning that may result from it, accordingly remains a contingent intra-textual and inter-textual process. There is for this reason ultimately nothing – no instance of stable meaning and no stable referential relation between a sign and some signified "semantic content" – that exists outside and independently from the contingent interplay of signifiers and the compilations and combinations of such signifiers that ultimately come to constitute a text. Outside the text there is just more text. The one text supplements and displaces another in an endless play of textuality.

What, then, is the point of it all? What was Derrida's point when he pointed out all of this? Was his point simply that there no longer is a point, or, that there never was a point as one may understand Friedrich Nietzsche already to have argued a hundred years earlier? Was his point that one should simply stop considering oneself burdened with this question so that one can begin to take part freely in the exhilarating charges and discharges – or disseminations – of an ultimately inexhaustible textuality? Let us engage with this question by taking a closer look now at the reception of deconstruction in legal theory.

II. THE RECEPTION OF DECONSTRUCTION IN LEGAL THEORY

The problem with many strands of deconstruction in legal theory, wrote Christopher Norris in 1988, concerns the way it reduces deconstructive techniques of reading to a too a general method that can be applied more or less any text for purposes of pursuing an already envisaged result or outcome (Norris 1988, 179). At the time of Norris' observation, James Balkin's seminal article "Deconstructive Practice and legal theory" (Balkin, 1987) could be considered exemplary in this regard. "Deconstruction" argued Balkin, "by its very nature is an analytical tool." (Ibid, 786). Balkin's article surely made its mark in legal theory, "mainstream legal theory" included. It even convinced Neil MacCormick that deconstruction was a useful "heuristic device." (MacCormick 1990, 554). The risk of reducing Derrida's reading techniques to a method, tool or "device" was perhaps always on the cards, but the materialisation of the risk could only take place at the cost of ignoring Derrida's caveat that deconstructive reading consists in a certain exposure of the reader to a text in a way that deprives him or her of the subjective control of that text. As Derrida put it, deconstruction consists in "the general movement of the field and it is never exhausted by the conscious calculation of a [reading] subject." (Derrida 1981, 82).

For Derrida, deconstruction involves the reader in a movement or *event* of reading to which he or she is exposed. It is not a method that the reading subject controlled for purposes of arriving at anticipated or desired outcomes. At the time of deconstruction's early reception in legal theory, Pierre Schlag was the one legal theorist who understood this aspect of Derrida's thought well. He pointed out how Balkin's understanding of deconstruction reserved for the reading self or subject a place outside the process of reading and outside the text for that matter. For Balkin, claimed Schlag, the outside of the text is still "me" - "*le hors de texte, c'est moi*" (Schlag 1990). Balkin surely did not shy away from this location of the reading subject outside the process of deconstructive reading. He unflinchingly affirmed the fact that the deconstructivist legal theorist has a premeditated politics. He or she has "an ax to grind"; she is "picking her targets" (Balkin, 1990, 1627-1629).

What Schlag pointed out well and what Balkin was happy to confirm was the fact that the reception of Derridean deconstruction in legal theory in the 1980s and 1990s went hand in hand with a conception of it as a tool that could be used by progressive or left wing legal theorists to pursue predetermined political goals. No one seemed to be bothered at the time by the possibility that, once reduced to a tool or method, deconstruction could also come to be

used for conservative or reactionary political goals. This possibility need not detain one's attention for long, for it did not materialise. Conservative and reactionary legal theorists most likely simply sensed that "deconstruction" was something that happened to belong to left wing or liberal legal theoretical circles and therefore stayed away from it. Besides, established paradigms of legal formalism and originalism surely served them well enough. They were certainly not out looking for new theoretical approaches.

Two considerations nevertheless make it necessary to take a closer look at the "leftness" or "progressiveness" of deconstructive legal theory. The first is the one just mentioned above: If deconstruction were simply a tool that could be utilised to upset or undermine dominant readings of text, that tool could be used by anyone, political conservatives and right wingers included. Secondly, Derridean deconstruction surely did not invent or inaugurate left wing politics, and is surely also not a prerequisite for such politics. Progressive politicians and lawyers have been fighting great battles and winning a good number of them (almost invariably relying on notions of "justice" and "fairness" that avid deconstructivists consider highly deconstructible) before Jacques Derrida started capturing the imagination of a new generation of largely left, liberal or progressive legal theorists. And, in as much as these progressive lawyers also lost many battles, deconstructive legal theory could hardly be expected or seen to offer the promise of fewer failures and more successes in future. On the contrary, faced with the question of deconstruction, progressive politicians and lawyers – to the extent that they are effective and efficient *politicians* and *lawyers* – are most likely to sense that deconstruction brings something unique to the scene of political deliberation that is likely to slow down one's progressive politics, instead of advancing or accelerating it. And this something unique would increasingly, Derrida's later work would increasingly reveal, was exactly the "outside of the text" that his early work claimed not to exist. Let us take a look now at this return of the outside of the text in Derrida's later work.

III. THE OUTSIDE OF THE TEXT

Were progressive politicians and lawyers indeed to put forward the misgivings regarding deconstruction as a political tool or strategy to which we have alluded above, they may well be quite right. The more the so-called "ethical" turn in Derrida's work became manifest during the 1990s, the more it became evident that deconstruction is not a tool that could be employed, but much rather a unique endeavour to precipitate the disruption of any such calculated and calculable employment of tools. It would become the recurring theme of Derrida's late work that key ethical and political concepts of Western civilisation such as justice, hospitality, forgiveness and friendship should ultimately not be considered political goals that can be achieved through the effective launching of methods and programmes. They are, on the contrary, denotations of encounters with an otherness or strangeness that arrives uninvited at our doorstep, so to speak. These encounters demand a response, but they evidently preclude any calculation of the response demanded, any rational determination of what should be done, any resort to available methods of operation, any recourse to existing political or moral

norms and codes. These encounters, are in fact, encounters with the "outside of the text."

However much Derrida may have stressed in his early work that there is "no outside of the text", he evidently became nothing less than obsessed with this "nothing" outside the text as the "ethical" and "political" turn in his work took shape. We shall presently take a closer look at the status or characteristics of this "ethical" and "political" turn. Let us first just note that Derrida did not consider this turn to introduce a new element into his work that was not there in the beginning. He always remained adamant that the concern with "différance" in his early work was already a contemplation of the arrival of otherness and strangeness that he would later come to articulate with recourse to notions of the event, justice, hospitality, forgiveness and friendship (see Derrida 1993b). If his claims in this regard are to be taken seriously, it would evidently mean that deconstruction never was the interpretivist celebration of the infinite possibilities of intra- and inter-textual meaning that it was widely understood to be in the early years of its reception. It was an endeavour to precipitate an encounter – and to solicit an experience – with an uninterpretable outside of texts that ultimately disrupts all interpretive claims. A very early description of the "method" of deconstruction indeed suggests exactly this. The inversion of semantic hierarchies that deconstruction seeks to solicit, wrote Derrida in 1972, is less concerned with the end result of this inversion than it is with *the interval of otherness* that becomes evident in the process of inversion, an interval of otherness that exceeds the textual or binary terms of both the initial and the inversed hierarchy (see Derrida 1982: 42). This description of deconstruction can plausibly be considered a clear indication that Derrida was always decidedly less interested in the new textual possibilities that may actually result from deconstructive practices, than he was in the disruption of textuality that occurred in the moment of deconstruction.

In other words, Derrida did not *value* deconstructive disruptions of texts for reasons of their beneficial effects. He did not value them because he had no doubt that they could not be valued or evaluated. They do not themselves have any value that they could offer, for they arrive, from beyond all frameworks and dispensations of value and evaluation, as critical moments that render these frameworks and dispensations fundamentally questionable. In the same text that he pointed out the "interval" that occurs in the inversion (the phase of overturning) of binary hierarchies, Derrida (1982:12) also observed that there is "no beyond of metaphysics" and no "transgression" (in the same vein that he claimed there "is no outside of the text"). This awareness of a limitless and inescapable metaphysics again reflected Derrida's insight into an interpretive condition – a condition that marks each and every instance of textual or situational interpretation – that allows no escape from the grasp of readily available normative evaluations. And yet, the concern with demands of justice, hospitality, forgiveness and friendship that disrupt all existing frameworks of normative evaluations in his later work would suggest that his early awareness of the ubiquitous and endless condition of textual or metaphysical or normative interpretation could hardly have constituted an act of resignation or surrender in the face of an

inescapable field of normative interpretation and evaluation, let alone a celebration of this field. As we saw above, this is surely not how Derrida understood his early work. Notwithstanding his insight into the ubiquitous textuality from which no act of reading or interpretation could escape, his concern with différance, trace, supplementation was along a paradoxical or *aporetic* concern with moments that offered fleeting encounters with the limits of a seemingly limitless text and limitless metaphysics.

It is important to underline again that Derrida did not consider these *aporetic* encounters with the limits of limitless systems of normative evaluation new sources of value or new grounds of evaluation. He had no illusions about their potential destructiveness as far as existing values and systems of value are concerned. Hospitality to the event, he wrote in *Spectres of Marx*, entails the willingness to risk the materialisation of evil (Derrida 1993: 57, 111-112). The relentlessness with which he pursued the possibility of these impossible encounters – the possibility of the impossible would become another recurrent theme in his late work (see for instance Derrida 2002) – should nevertheless caution any legal theoretical engagement with his work to pay due attention to the irreducible difference between law (the ultimate instantiation of normative evaluation) and justice (the most incisive encounter with the disruption of available normativity) that he would emphasize in *Force of Law* (Derrida 1990), the text that remains Derrida's most direct and encompassing engagement with law and legal theory. Let us now take a closer look at what a due regard for the difference between law and justice might mean for the relation between law and deconstruction, considering that Derrida expressly equated deconstruction with the justice that the law is *not*.

IV. DECONSTRUCTION AND LEGAL THEORY

Legal theoretical engagements with Derrida's work have indeed made little effort thus far to make sense of the hospitality to the potentially hugely destructive eventfulness of existence that Derrida evidently considered the heart of his concern with deconstruction. Engagements with the demands of justice can easily be understood as normative engagements with the amelioration of law. In the case of Derrida, such an understanding of justice would be a misunderstanding. For him, justice concerns a disruptive event that renders existing law inapplicable. The same applies to any future law that may come to replace existing law after disruptive encounters. In other words, justice should also not be confused with any improved law – or any improvements of law – that may be introduced after forceful experiences with the unsuitability and inapplicability of earlier law. Justice concerns, for Derrida, the very experience of an irreducible incongruity between the demands of justice and all positive instantiations of past, present or future law. The experience of justice as an experience of irreducible incongruity is such that no law reform can ever hope to overcome or erase it. This should caution one against the kind of link between deconstruction and purposeful law reform that Balkin and many other early proponents of legal theoretical deconstruction seemed to contemplate.

The same applies to the relation between deconstruction and revolutionary interventions that may bring about far-reaching legal change. Again, one can imagine Derrida or any other deconstructive legal theorist to be highly in favour of and even elated about some or other instance of far-reaching legal change that left-wing or progressive legal theorists may consider a victory. Deconstruction surely does not proscribe or preclude solidarity with the left. It just should not be equated with it, given its concern with an extreme concern with incongruity that hardnosed left-wing politicians may well consider curious or quaint, if not downright obstructive and debilitating. Deconstructive legal theory will and should of course not consider itself quaint or curious, but it may want to pay due attention to its potential to indeed turn out obstructive and debilitating, or in any case not very helpful, when it comes to positive pursuits of programmatic political goals. For only if it does so, will it attain an incisive understanding of its unique relation to such positive pursuits of programmatic political goals.

The Derridean or deconstructive concern with the incongruity between law and justice – the incongruity that allows for no pragmatic or revolutionary closure of the gap between them – is perhaps nowhere more expressly and strikingly articulated than in the passage in *Force of law* where Derrida describes the sheer madness of the justice he contemplates (see Derrida 1994a:56). The conception of justice that he puts forward here would seem to suggest, as forcefully as Foucault suggested, that the way from man to the true man somehow passes through the mad man" (*de l'homme à l'homme vrai le chemin passe par l'homme fou* - Foucault 1972: 544). Derrida's fascination with an insane suspension of law surely resonates well with Foucault's anti-institutional and anti-juridical concern with freedom. From the perspective of any legal theory that stresses the need for juridical, institutional and regulatory stabilisations or formalisations of liberty, this anti-institutional and anti-juridical concern with a pristine freedom and a pristine justice must come across as sheer madness. This is how lawyer and legal theorists can invariably be expected to see the matter, left-wing or progressive lawyers and theorists included. Alain Supiot's assessment of Derrida's as nothing less than lunacy (*folle en effet*) is a case in point (see Supiot 2010: 48).

Neil MacCormick once offered a surprising olive branch to the "deconstruction wave" in legal theory by recognising its transformative and innovative potential. Had he discerned the extremity of Derrida's "insane" concern with the radical incongruity between justice and the law as clearly as Supiot does, he may well have been less convinced of the transformative and innovative potential of deconstructive legal theory. But he took his cue from theorists like Balkin who had tamed and domesticated deconstruction in order to extract from it an innovative and transformative potential. Legal theorists who continue to deem it important to engage seriously with Derridean *deconstruction* for purposes of distilling from it *constructive* insights for the normative concerns of legal theory would either have to admit that they are still relying on a highly tamed and domesticated understanding of Derrida's work that ignores essential aspects of it, or they would need to break new ground to show what the radically disruptive potential of his work might mean for legal theory after all.

Despite his generous accommodation of the deconstruction movement in legal theory, MacCormick retained a clear enough sense of its sheer and ultimately rather "unconstructive" disruptiveness to nevertheless impart the message that the really important work of jurisprudence and legal theory lies elsewhere. From the perspective of the more incisive regard for Derrida's radical concern with the abyssal divide between law and the deconstructive experience with justice, one may want to consider "Reconstruction *and* Deconstruction" as a better title than "Reconstruction after Deconstruction" for the insights MacCormick sought to communicate. The phrase "Reconstruction *and* Deconstruction" communicates – or can be read to communicate – a more incisive regard for the disjunction between the deconstructive concern with an impossible justice, on the one hand, and the legal theoretical concern with possible law and plausible law reform, on the other. Not only would this simple juxtaposition of deconstruction and legal theory resonate better with the categorical divide between law and justice (deconstruction) that Derrida articulated in *Force of Law*, it would also recognise better the equally legitimate or at least equally inevitable demands that both concerns – the concern with good and coherent law and the concern with abyssal encounters with the irreducible inadequacy and inapplicability of all law – make on the human imagination.

This understanding of the irreparable disjunction between law and legal theory, on the one hand, and the deconstructive concern with an abyssal experience with justice, on the other, invites one to recognise and take seriously the completely opposite trajectories of legal theory and deconstruction. Deconstruction seeks to move – doomed to fail, no doubt – directly towards the cataclysmic event that catapults it into existence. It seeks to return to the event from which it derives. This much is clear from the reckless hospitality to the event that Derrida describes in *Spectres of Marx*, already pointed out above. Law and legal theory seek to move – ultimately equally doomed to fail – away from the cataclysms (social conflict, revolution, crime, delict, etc.) that call them into existence. This decisive retreat from the event is most evident in Hans Kelsen's endeavour to construct a pure theory of law, a theory that extracts and distils the law from the historical reality from which it emerges (see Van der Walt). This radically opposite trajectory of Kelsen's pure theory of law may well be – perhaps surprisingly, but deeply plausibly – the legal theory that tells one more about deconstruction than any legal theory that seeks to integrate deconstruction into legal theory. Kelsen's normative constructivism and Derrida's non-normative deconstruction may well be closer companions than one would think at first.

The human condition appears to be fatefully suspended between – and sustained by – both these Kelsenian and Derridean trajectories. It is unthinkable that a future humanity might one day desist from normative constructions that shield it from the chaos and uncertainties to which its irreducible historicity (its existence in the openness of time and history) exposes it. But it is also unthinkable that a future humanity might one day be fully reconciled with these normative constructions that shield it from the vicissitudes of its historical existence. This is so because humanity also

invariably experiences and perceives normative constructions – established moral, legal and even aesthetic codes – as hardened shells that frustrate life as much as they protect it. As long as this deep duality between the need to be shielded from and the desire to be exposed to the reality of existence continues to condition the human imagination, the impulses that incline legal theorists to enthusiasm for Derridean notions of deconstruction are likely to continue their tug of war with Kelsenian concerns with adequate normative construction. A simple choice in favour of the one or the other side is not an option for those jurists and legal theorists with a realistic and holistic regard for both these sides of the human psyche. And the idea that a better reconciliation between these two sides will become possible one day also does not strike them as seriously plausible.

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