# DO BE DO BE DO - LANGUAGE, LAW AND THE THEORY OF DECONSTRUCTION

*Tushna Thapliyal**

## *INTRODUCTION*

One of the most important skills a law student acquires is the use of language. He/she is encouraged to use language economically and yet lucidly. However, every lawyer or law-maker knows the weaknesses of language, be it in statutory interpretation or while drafting a sale deed. The limitation of language can be illustrated by a simple comparison of the following statements :-

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| "To do is to be" | - | Sartre |
| "To be is to do" | - | Nietzsche |
| "Do be do be do" | - | Frank Sinatra |

This sums up quite effectively how language works and does not work. It is in this context that the deconstruction theory is resorted to. It not only breaks down legal theory, but also the very language of law with the help of linguistic techniques. The focus of this paper is to examine the theory of deconstruction as a tool for lawyers and evaluate its effectiveness in the interpretation of legal texts and theories.

## *A BACKGROUND TO DECONSTRUCTION*

Philosophical thought in 19th century Europe had rejected God and Reason in the wake of new inventions and discoveries. Revolutionary ideas erupted in the likes of Nietzsche and Freud. They discredited life in toto - rejected it as having no meaning or intrinsic value. Their quest was not for an ultimate truth; rather they proclaimed that there was no one truth. Nietzsche's cry that 'God is dead' was echoed by the likes of Camus and the Existential scholars. His philosophy took root in France under Jacques Derrida who applied it to the interpretation of literary texts. Derrida extended Nietzsche's notion of meaningless into language - he believed words were signs on paper and what they signified was relative to each reader. Interestingly, in Indian Philosophy the quest for the meaning of life has thrown up many answers, including Nietzsche's that life has no meaning. The story of Shvetaketu epitomises the existential message - that the essence of the Banyan tree lies in the emptiness within the seed.

Deconstructionists apply existential principles to the reading of literary texts. Their premise is to de-centre or to move away from the centre, or the notion of being, as knowledge is perspectival and no reading is the final reading.

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* IV year, B.A., LL.B. (Hons.), National Law School of India University.

Derrida questions the structure of language, the meaning of signs and the inter-relation between them. He examines how a sign is reduced to thought and infers that every sign has infinite meanings. This indeterminate character of the meaning of signs is the basis of Derrida's theory.

The techniques used by Derrida to deconstruct include the use of etymology and language. Another technique is to inverse so-called 'oppositional hierarchies' or two connected ideas/concepts. Deconstructionists also try to reach common point between two opposing concepts - for instance, nature and culture meet at the point of incest taboo (called as 'scandal'). At this point they are no longer in opposition and influence each other equally. Derrida's resistance to theory and to structure has been enhanced by critics such as Foucault, de Man, Fish and Miller. All of them are critical of the use of language as a medium of expression. They believe language is an unreliable medium for stating simple truths due to its rhetoric and figural component.[1]

An immediate implication of this is that any text is historically conditioned. Foucault goes ahead to say that even the interpreter/reader is equally conditioned and hence the meaning is only derived from the interaction between the text and reader. Or in other words, the text is both all meaningful and meaningless. Deconstuctionists, therefore, look for hidden and unintended meanings and inter-links between words - they let the text speak for itself through what they call the free play of texts. A deconstruction of myths will lead us to the conclusion that there is no common theme or 'Centre'.[2] Likewise, if one were asked to identify the core of music, it would be impossible. It is only the shadows that are actualised.

In summary the tenets of deconstruction are:

1. all readings are misreadings;
2. each reader must produce his own meaning from the text;
3. let the text speak for itself;
4. the birth of the text leads to the death of the author;
5. the only purpose is to end in an impasse.

The resistance to theory on the part of the deconstructionists is only a manifestation of theoretical contradictions. However, one cannot argue that this is sufficient reason to do away with theory altogether. As de Man points out, it would be like 'rejecting anatomy because it has failed to cure mortality'.[3] The importance of language and play of words in deconstruction theory is a limiting factor - theorists use the same language or word games to expose structural flaws. In this sense the theory is trapped within language. Derrida attempts to 'escape'

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1 Paul de Man, *The Resistance to theory,* David Lodge (Ed.), *Modern Criticism and Theory* 354 (1988).

2 Jacques Derrida, *Structure, Sign and Play in the Discourse of Human Sciences, ibid.* at 117.

3 Paul de Man, *supra* n. 1 at 335.

by coining his own phrases such as *differance* to mean difference and deference with respect to the meaning of signs. The limitation is not only of practical consideration but also professional. Deconstructionist critics are authors in their own right and use the very medium they seek to demolish. This contradiction works to the advantage and disadvantage of the writer-critic. For one, it makes him doubly cautious of his choice of words, and secondly, it binds him within his choice. His aim is to be precise, yet language often fails him. He, like his interpretation, ends in an impasse.

### *ADAPTATION OF DECONSTRUCTION THEORY TO LEGAL THEORIES AND TEXTS*

The applicability of deconstruction theory to law includes both deconstruction of legal theories as well as legal texts. The deconstructionist's definition of the word 'law' would be closer to the positivist definition of law as it is: the word law derived from Middle English Law *legh*, Old English *Lagu* from Scandinavian (Iceland) or Layer, the plural of which is *Lag*, literally that which is laid down.[4] Deconstruction of a legal theory involves freeing it of its assumptions and claims. For instance, a critique of Hart's theory of rule application will reveal that his so-called language centred premise is essentially a 'traditional' and objectifying body of ideas.[5] Hence, the critic concludes that rules are taken most seriously when they are treated most sceptically.

Whereas Hart believes that rules must be applied, the critic argues that the meaning and application of rules is contextual and therefore open. Further, applying rules is a political matter of taking sides: the only questions are which and when. For example, the meaning of the word 'vehicle' originally meant horse-drawn carriages. It later came to exclude these from its ambit. Hence, rules have a core of accepted meaning and a penumbra of uncertainty - in such a case, Hart's three-step process of rule application is anything but cut and dry.

A deconstruction of contract theory is an attempt to delink the basic notions of intention from obligation. Atiyah points out that intention need not always create obligation even in explicit promises - what of the person who orders a meal in a restaurant without any intention of paying? He is presumed to have created an obligation because it would be unfair to the promisee who has placed reliance on him. These are the very reasons underlying the obligation of an implicit promise. Atiyah thus shows how the classical Will Theory of Contract ultimately depends upon the implicit promise (which is 'supplementary' or 'less privileged' in Derrida's terminology). The theory reflects the 19th century notion of executory promise where implicit promises were the exception. This example of deconstruction exposes the pervasive underlying ideology which gives rise to the privileging. Moreover, it gives us the chance to investigate the unquestioned ideological assumptions in our current doctrine. Atiyah replaces Will Theory

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4 *The Random House Dictionary of the English Language* (1983).

5 Allan C. Hutchinson, *A Post Modernist's Hart: Taking Rights Sceptically*, 58 MLR 788 (1995).

with reliance and benefit as the sources of the promissory obligation, thus establishing a new hierarchy. The author[6] points out that underlying the binding nature of implicit promises is the Will Theory or the intention to create such obligation. Hence, Will Theory and reliance-benefit theory exist in a relationship of *differance*. More interesting is the deconstruction of a legal text: what happens when a critical essay such as a judgement extracts a passage from an authority or an earlier case and cites it? J.M. Miller[7] answers this question using the analogy of host and parasite.

Miller rephrases the question as - is a citation an alien parasite within the body of its host, the main text, or is it the other way around, that is, the interpretative text being the parasite which surrounds and strangles the citation which is its host? According to him, the cited passage is the food; the essay, the host; and the critic, the parasite. The passage is broken, divided, passed around and consumed by the critics. Hence, it is at once good, a gift and a host. Further, if the passage is food for the critics, it must have in its turn eaten, that is, relied on earlier texts. Miller's analysis is centred around the citation of a poem or part of it in a critical essay. It is especially relevant to the critique of a judgement under Common Law where the principle of *stare decisis* applies. The judges are bound by precedents yet they have to face new circumstances each time. It is the iterable character of law which thus makes Rule of Law possible.

The Supreme Court of India has expanded the right to life under Article 21 of the Constitution to include the right to live with human dignity, right to housing, and right to work. Each expansion of the right is derived from a preceding judgement. Thus, each 'eats' from the other and is, in turn, 'eaten' - the role of the Judge being that of the parasite. Or, to use Dworkin's phrase, it is the process by which the chain novel of law is created.

To this analysis can be added the Foucauldian perspective. Foucault questions *what* is an author? Is a Judge or legislator an author? If a judgement or a statute is a text, it should speak for itself. There is no need to go back to the author for reference. What the author intends may not be what the text says. Hence, he disregards the author as the origin and the owner of the work. This can be supplemented by a practical analysis of the legislative procedure - legislators may have voted without reading the bill, they may have voted because they are paid to do so or in return for political favour. In such a case why do we attach so much importance to the legislator's intention? The complexity of legal texts often results in the lawyer making a partial reading of the text, be it case law or an article. He represents only favourable interpretation of the text. Hence, a legal battle is an attempt to defend opposing interpretations. In the language of deconstructionists, this would be a verification of the first tenet, that all readings are misreadings. If this is true, then law cannot be a rational enterprise and it would be impossible to achieve the Rule of Law. At the same time, it is the

6 J.M. Balkin, *Deconstructive Practice and Legal Theory*, (1987) 96 Yale LJ 743.

7 J.H. Miller, *The Critic as Host*, *supra* n. 1 at 144.

iterable nature of legal materials and the incompleteness of legal interpretations which enables the Rule of Law to operate in the manner we think it should. Thus, Derrida would conclude that the free play theory and the intent theory must co-exist in an uneasy alliance - in a relationship of *differance* or, in other words, what is not intended is as important as what is intended.

### *A CRITIQUE OF DECONSTRUCTION*

The application of deconstruction of legal theory provides the lawyer with three important uses for it:[8]

1. Deconstruction provides a method for critiquing existing legal doctrine - a deconstructionist reading can show how arguments offered to support a particular rule undermine themselves and instead support an opposite rule.
2. Deconstruction techniques can show how doctrinal arguments are informed by, and disguise ideological thinking.
3. It provides a new kind of interpretative strategy and a critique of conventional interpretation.

An important contribution of deconstruction techniques to Law is the understanding in the concept of *locus standi*. The traditional notion only permitted the aggrieved to sue. The presumption being that injury done was quantifiable as it affected one/few persons. However, upon closer examination it was found that the aggrieved party could even be many. Hence, the concept was broadened to provide for Public Interest Litigation (PIL). This effectively shattered the premise that injury had well-defined limits. Environmental damage cases have shown that human suffering is often incalculable as no accurate measurement of potential adverse effects is possible.

As to the question, why deconstruction? It is not merely a semantic or reductionist exercise. It provides us with striking insights and unsuspected incongruities and differences in our literary and philosophical writings.[9] In law, it is contemporary with reconstruction or the attempt to replace fault norms with more coherent ones.[10] Moreover, as Gadamer points out,[11] the interaction with the text throws into relief the prejudices of the interpreter. This leads us to the interference that both the text and the interpreter must be understood within the limits of their effective history, stylised practices and prejudices.

Critics of deconstruction project the theory as useless.[12] Fish believes that meaning is determinable and that Derrida and de Man are under a misconception.

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8 J.M. Balkin, *supra* n. 6 at 745.

9 M H. Abrams, *The Deconstructive Angel*, *ibid*. at 215.

10 J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, Yale LJ 105 (1993).

11 Brad Sharman, *Hermeneutics in Law*, MLR 386 (1988).

12 Christopher Norris, *Law Deconstruction and Resistance to Theory*, 15 Journal of Law and Society 166 (1988).

Further, deconstruction belongs squarely within the framework it seeks to deconstruct. It has no practical application as it does not replace the edifice it seeks to destroy and it cannot be anti-foundationalism and provide a foundation at the same time. As to the bottom-line, is nihilism the unavoidable consequence of deconstruction? It is best answered if compared with psychoanalysis.[13] Dreams, like texts, are human creations. Their interpretation may result in enlightenment and emancipation of the sub-conscious mind. The goal of emancipation is an act of self-realisation - for the deconstructionist, it is a political and moral choice informed by the activity of deconstruction itself. Hence, one may liberate the text, but most often one ends in an impasse.

Notably, deconstruction cannot be limited to a particular ideology or methodology. Ancient Vedic scriptures used it as a tool of reasoning before it was recognised as such. Its potency as an analytical aid is every interpreter's discovery. For the die-hard believers in the meaning of life or law, deconstruction is anathema. They prefer to struggle with rules of statutory interpretation rather than look for the obvious. A parting shot to Nietzsche comes from an unlikely source - graffitti on the wall: "God is dead" - Nietzsche : "Nietzsche is dead" - God.

## *CONCLUSIONS*

At this point the question to be asked is, who is the ideal interpreter? According to Gadamer,[14] it is a person who is as aware of his prejudices as he is of the texts. The interpreter should approach the text with the presumption that it has an answer. If necessary, he must reconstruct his question in order to allow for a dialectic between the text and himself. To this extent, Gadamer is closer to Foucault than Derrida - whereas Foucault interacts with the text purposefully, Derrida merely 'plays' with it. However, Gadamer believes that the dialectic of question and answer is absent from legal interpretation as the lawyer/Judge/student approach the text with a purpose - to perfect the art of winning arguments. Hence, he infers that legal interpretation is methodological and not hermeneutical, that is, there is no genuine attempt to understand on the part of the reader.

It has been pointed out that the deconstruction techniques will be of use to Left legal scholars[15] because of the historical connection between continental philosophy and Left political thought. Moreover, they have more to gain from showing the ideological character of the status quo than does the Right. Critical Legal Studies scholars enlist deconstruction as a weapon against every last precept and principle of established judicial thought to expose the antinomies of classic liberal reason and jurisprudence.[16]

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13 J.M. Balkin, *supra* n. 6 at 748.

14 Brad Sharman, *supra* n. 11 at 389.

15 J.M. Balkin, *supra* n. 6 at 786.

16 Christopher Norris, *supra* n. 12 at 168.