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The chaotic classroom: Deconstructive divergence and the teaching of the law of obligations

Prof Steve Cornelius
University of Pretoria

1 Introduction

A law lecturer should generally aim to achieve five things: Firstly, the aim should be to increase the students' general and specialist knowledge of the law; secondly, students must learn to think for themselves and not merely follow what is taught in class and in doing so, thirdly, students need to develop and improve their analytical and critical legal reasoning; fourthly, one needs to instil in students a sense of professionalism and legal ethics; and lastly, students should develop a lifetime love of learning and the law.

2 Discourse of teaching

Law lectures often become spaces where the discourse is a two-dimensional relationship between the lecturer and the students which is mostly unidirectional. Legal discourse is presented from a structural point of view as a study of the systematic application and interpretation of legal rules.[1] Law students are then indoctrinated to consider legal reasoning as a deterministic linear process in which the output or conclusion is in direct determinable proportion to the input of the legal question and applicable legal rules.[2] The objective meaning of the law

1 NJC van den Bergh 'Die Betekenis van die Strukturele Hermeneutiek vir die Uitleg van Wette' LLD thesis, University of the Free State, 1982 239.

2 G Adams, B Brumwell & JA Glazier 'At the end of *palsgraf* there is chaos: An assessment of proximate cause in the light of chaos theory' (1998) *U Pitt LR* 507 508.

is emphasised, presented from the subjective space of the lecturer and imposed as such on students.[3]

This deterministic linear process is presented with various acronyms:[4]

(a) IRAC – State the *issue*, state the applicable legal *rule*, *analyse* the facts against the legal rule and arrive at a *conclusion*.

(b) CRAC – Summarise the *conclusion*, state the applicable legal *rule*, *apply* the rule to the facts and arrive at a *conclusion*.

(c) CREAC – Summarise the *conclusion*, state the applicable legal *rule*, *explain* how the rule is interpreted and applied by the courts, *apply* the rule to the facts and arrive at a *conclusion*.

As a simplified example, one can use the CREAC method to briefly summarise the judgment in *Spenmac (Pty) Ltd v Tatrim CC*[5] as follows from the perspective of the purchaser:

C: The contract for the subdivision and sale of land was void due to lack of consensus.

R: Where a misstatement of facts by the seller during negotiations for a contract, leads to an error on the part of the purchaser in respect of the proposed contract that is reasonable and material, there is a lack of consensus and the proposed contract is void.

E: The correct enquiry is whether the error precludes consensus between the parties. If a misstatement of facts by the seller gives rise to an error on the part of the purchaser, such an error is reasonable. An error relating to the nature of the thing sold, is material. If both requirements are met, the error precludes consensus and the proposed contract is void.

A: The seller incorrectly represented to the purchaser that the sectional title unit that was for sale, was one of only two units and that the owner of a unit could veto any further

3 Van den Bergh (n 1) 241.
4 Columbia Law School Writing Centre *Organising a legal discussion* 2021, https://www.law.columbia.edu/sites/default/files/2021-07/organizing_a_legal_discussion.pdf (accessed 30 January 2025).
5 2015 3 SA 46 (SCA).

development of the other unit. The incorrect representation dealt with the nature of the property which was for sale.

C: The error by the purchaser was both reasonable and material. This excluded consensus so that the proposed contract was void.

While these are helpful tools to provide some structure to an argument, the infinite diversity of matters that arise in legal practice does not provide a pre-set formula that is capable of empirical verification and which can always be applied rigidly in the same way in every situation.[6] As much as lawmakers and citizens would like for it to be true, the law is not an exact science with mathematically precise answers that can be consistently calculated according to the same set formula to resolve difficult problems.

Far from being a shortcoming of the law, it is this imprecise nature of the law which allows for considerations of humanity and ubuntu to shape the outcomes of difficult legal questions. It allows for the law to adapt, often in subtle ways, to the unique circumstances and challenges that real humans face in real life – it avoids the harsh cold mechanistic application of fixed unalterable rules of law that will often serve more injustice if applied in a strict, harsh manner. Legal discourse is more than a fixed, structuralist memorisation, interpretation and application of deterministic legal rules according to a fixed formula that always applies equally in all situations.[7]

3 Deconstructing legal discourse

'Deconstruction' is arguably one of the most misunderstood expressions of our time and is often used as a synonym for 'disassemble' or 'dismantle'. In a more abstract sense, it is often used to explain that a rule or concept is examined, deciphered or analysed. However, in a philosophical sense 'deconstruction' has a much more profound meaning.

Van Blerk[8] describes deconstruction as a strategy to expose internal inconsistencies and contradictions in discourse. Deconstruction is concerned with the preservation of the unique and the singular. It warns

6 G Leyh (ed) *Legal hermeneutics* (1992) 119.
7 Van den Bergh (n 1) 239.
8 AE van Blerk *Jurisprudence – an introduction* (1996) 225.

us that the one-sidedness of the law and legal norms, perpetrates violence against the unique and the singular and reminds us of the radical and irrevocable loss of the unique and the singular in the process of applying the law.[9]

There is a divergence between law and justice.[10] Law is the system of norms that arise from the history of right and of legal systems. Law can be improved and one law can be replaced by another. But law always remains the one-sided system of norms in which the unique and singular predicament of the legal subject is lost. Justice is the attempt to recognise the unique and the singular. Justice is the impulse that drives the continued improvement or deconstruction of the law. It is the only force higher than the law so that an appeal to justice beyond the law, is required.[11] Because meaning is an endless promise that can never be fulfilled, the concept of justice is also an endless promise so that it is not possible to preserve the unique and the singular and achieve true justice. To be just, a lawyer cannot merely apply the law, because the law is ambiguous, but has to reimagine the law for every new problem that arises.[12] According to Goosen[13]

> 'it is precisely because we do not have access to unambiguous guidelines that the need for a real judicial decision always arises.'

Deconstruction does not propagate nihilism or a total disregard for norms. While the inescapability of norms is acknowledged, deconstruction strips them of their claim to cognitive privilege and thereby keeps them open for interpretation and reinterpretation. It is argued that legal analysis validates outcomes that arise from certain types of experience and denies the validity of others. In the sense of deconstruction, analysis of the law is the construction of norms that are the result of the deconstruction work of others in their normative worlds.[14]

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9 DP Goosen 'Deconstruction and tragedy: A comparison' 1998 *Acta Juridica* 21.
10 J Derrida *Deconstruction in a nutshell: A conversation with Jacques Derrida* (2020) 16.
11 W Maley 'Beyond the law? The justice of deconstruction' 1999 *Law and Critique* 49 52.
12 Derrida (n 10) 17.
13 Goosen (n 10) 22.
14 HJ Silverman & D Ihde (eds) *Hermeneutics and deconstruction* (1985) 147.

Discourse about the world is produced in the world, just as discourse about the law is produced from within the law.[15] According to Silverman and Ihde,[16] deconstruction shows that

> 'we cannot really suppose that there is a fixed, finite, and adequate conceptual scheme that *we* draw on in so speaking, that *was* drawn on by all who spoke before us, and that, intact through the entire sequence, *will* be drawn on by those who are still to come; or that may be formulated, made explicit once and for all, tested somehow for its adequacy to fit and accommodate (without distortion) whatever, *in fact*, corresponds to whatever is true (authors' emphasis).'

Students need to be afforded the space where they are encouraged to analyse, unravel, assess and decode legal norms to expose internal inconsistencies and contradictions in the legal discourse so that they learn to transcend the divergence between law and justice.

Furthermore, to be just, the lawyer has to question whom the law serves. This question can and should be considered in the pejorative sense that the law only serves the rich, or big corporations, or the state. The question should rightly then be asked whether the law can provide a solution which is just. But there is also a divergence and the question must furthermore be considered on a more fundamental basis that the law serves the public interest. Any solution which is inimical to the public interest, cannot be a just solution. In addition, on a more aspirational level, the lawyer representing a client would desire for the law to serve the client. Students should therefore also be taught to understand that the proposed solution depends on the client and interests that the client represents.

4 The chaotic classroom

Law lecturers should train law students to deal with the fluid nature of the law. There should be a focus on law as a complex adaptive system. Legal discourse is a multi-dimensional process in which various actors, events and considerations affect the eventual result of a legal question. There is no position of detached neutrality where legal discourse can be dissociated from the legal and social context in which it takes place. Students should be trained to deal with these multi-dimensional factors

15 Silverman & Ihde (n 14) 145.
16 Silverman & Ihde (n 14) 146.

to shape and reshape the resolution of any legal problem according to the law and the social setting in which it takes place.[17]

In other words, it is necessary to move away from the structured two-dimensional and unidirectional discourse in the classroom and introduce chaos into the lectures. However, chaos is not the same as indiscriminate disorder or pandemonium. Chaos in the classroom does not imply that discourse is indeterminate and conclusions are random. Chaos is deterministic.[18] The law is a complex adaptive system which is not deterministic in the structural, linear sense. Students need to learn that, while the law may sometimes seem to be chaotic and unpredictable, they are still guided by some underlying fundamental principles of law that restore some measure of regularity[19] in which certain patterns emerge.[20] By carefully immersing students in the discourse and feeding information in selective bundles, the lecture can engage with the students and then gradually introduce interference or 'noise' into the discourse to steer the discourse first in one direction and then make an abrupt turn. Legal discourse is always contaminated by interference or 'noise'. In other words, the apparent regular legal discourse based on the structural application of a legal rule, is always disrupted by the unique circumstances and socio-economic considerations of the actors involved, as well as their aspirations and the facts derived from the events and other considerations surrounding the matter. In addition, crucial facts are not always immediately apparent or disclosed by the actors involved, which could add to the interference or 'noise' that is experienced. As a result, input and output in discourse are disproportionate and discourse is non-linear.[21] In this way, students can become familiar with an environment where every part of the discourse depends on something else so that the current classroom discourse is always to some extent undermined by the absence of more elaborate background information.[22] Students need to understand that the law is a complex system that may seem to be chaotic and unpredictable, but in seeking solutions to legal questions, students

17 Goldberg 'And the walls came tumbling down: How classical scientific fallacies undermine the validity of textualism and originalism' *Hous LR* 463-478.
18 I Stewart *Does God play dice? The new mathematics of chaos* (1997) 130.
19 Adams, Brumwell & Glazier (n 2) 508.
20 Adams, Brumwell & Glazier (n 2) 513.
21 Adams, Brumwell & Glazier (n 2) 508.
22 Silverman & Ihde (n 14) 193.

need to be guided by some underlying fundamental principles of law, fairness and justice that restore some measure of regularity[23] in which the discourse begins to conform to certain patterns. [24]

Students can then be sensitised to the fact that any solution to a legal problem is subject to context, but context can be evaluated and interpreted in different ways so that it cannot be determined in an exhaustive or comprehensive way.[25] Possible outcomes are sensitive to external influences and small shifts in focus are amplified[26] so that the exact solution to a legal problem may be undecidable in any given case-study. [27] Inevitable differences in their predisposed points of departure and in the way that different students ascertain and interpret any given scenario, lead to diverging solutions to a given problem. In this way, students acquire an understanding of the law and the relevant public policy considerations underlying that particular field of law and the general principles that underlie the subject. The emphasis then shifts to competent application of the law, rather than reciting legal rules or principles verbatim or repeating the solutions that the lecturer proposes in the classroom. Students are then encouraged to provide their solutions to problems and not merely to repeat the solutions that the lecturer may prefer. As long as students can justify the solutions which they propose with competent application of legal rules, those solutions should be rewarded even if they are in direct opposition to the solution which the lecturer would prefer.

This gives rise to a new approach which can be described by the acronym SIDEARC: *Summarise* the conclusion, determine the *interest(s)* served, *deconstruct* the law, *explain* how the divergent rules are applied by the courts, *apply* the appropriate rule(s) to the facts, determine the appropriate *remedy* and provide a *conclusion*.

On this basis, the judgment in *Spenmac (Pty) Ltd v Tatrim CC* [28] can be revisited as follows from the perspective and interest of the purchaser:

23 Adams, Brumwell & Glazier (n 2) 508.
24 Adams, Brumwell & Glazier (n 2)513.
25 D Wood (ed) *Derrida: A critical reader* (1992) 175.
26 Stewart (n 18) 113.
27 Wood (n 25) 175.
28 2015 3 SA 46 (SCA).

S: The contract for the subdivision and sale of land was void due to lack of consensus. The property sold can be recovered with the *rei vindicatio* and any portion of the purchase price that had been paid, can be recovered with an enrichment claim.

I: It is in the public interest that contracts entered into freely and voluntarily, should be honoured. However, it is equally in the public interest that proposed contracts that are induced by a misrepresentation, should not be honoured. It is not in the purchaser's interest that a contract which induced by misrepresentation should be enforced.

D: The rule *pacta sunt servanda* provides that contracts must be honoured. This rule can lead to grave injustice where the consensus was not obtained freely or was induced by deception. Where a misstatement of facts by the seller during negotiations for a contract occurs, the consensus can be tainted or even completely absent. If the misrepresentation leads to an error on the part of the purchaser that is not material, the consensus is tainted and the contract is voidable at the election of the purchaser. If the misrepresentation leads to an error on the part of the purchaser in respect of the proposed contract that is reasonable and material, there is a lack of consensus and the proposed contract is void. If the misrepresentation was made fraudulently or negligently, the purchaser may claim damages in delict. If the misrepresentation was made in an innocent way, delictual liability is excluded. In addition, the misrepresentation could also be the basis on which estoppel can in appropriate circumstances be raised as a defence against the seller. Whichever approach is taken, will depend on the interest of the purchaser – if it is in the interest of the purchaser to uphold the contract, the arguments will be presented on the basis that there was a non-material error on the part of the purchaser and that consensus was obtained improperly. If it is in the interest of the purchaser to avoid the contract, the arguments will be presented on the basis that there was a material error on the part of the purchaser and that the contract was void.

E: The seller incorrectly represented to the purchaser that the sectional title unit that was for sale, was one of only two units and that the owner of a unit could veto any further development of the other unit. The incorrect representation dealt with the nature of the property which was for sale.

A: The correct enquiry is whether the error precludes consensus between the parties. It is not in the interest of the purchaser to uphold the contract. The argument is presented that the misstatement of facts by the seller gives rise to an error on the part of the purchaser, that is reasonable. It is also argued that there is an error relating to the nature of the thing sold, which is material. If both requirements are met, the error precludes consensus and the proposed contract is void.

R: If the contract is voidable, the purchaser may elect to uphold or to cancel the contract. If the purchaser elects to cancel the contract, restitution must take place. If the contract is void, there is no contract and therefore no contractual remedy. The property sold can be recovered by the seller with the *rei vindicatio* and purchaser can recover any part of the purchase price that had been paid, with an enrichment claim. Irrespective, the purchaser can claim damages in delict for misrepresentation with the *actio legis Aquiliae*, provided that the misrepresentation was fraudulent or negligent and the purchaser has indeed suffered damage or loss.

C: The error by the purchaser was both reasonable and material. This excluded consensus so that the proposed contract was void.

This clearly leads to an analysis which is far more elaborate and can also, depending on the direction of the discourse or the nature of an assessment question, include a consideration of the matter from the perspective of the seller.

5 Conclusion

It is important to teach law students how to think for themselves and not merely to rely on the views expressed by lecturers. This is achieved by encouraging analysis, discussion and debate in class and by setting fairly

open-ended assessments with facts that can be interpreted in different ways so that there may not be just one unique answer to each question. Reference is made to the myriad of judgments in the Constitutional Court and Supreme Court of Appeal where judges deliver minority dissenting judgments. In this way, students should be taught that there is seldom just one unique right or wrong way to apply the law to a problem. They should be taught to interpret, analyse and deconstruct the law and the facts to reveal the various divergent outcomes that are possible and be equipped to come up with the solution which they consider to be the best in the circumstances. As long as students can justify their conclusion based on competent application of the law and appropriate analysis of the facts, their solutions should be encouraged and rewarded.