Courts, Crisis, and Contestation

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2018

document version
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SUMMARY

This dissertation explores two main questions related to a type of political rhetoric I call crisis discourse. The first question is descriptive and asks *what force can crisis discourse have on judicial decision-making?* Second, I attend to a more normative question: *how should judges, particularly in times of crisis, take account of the impact crisis discourse has on their decision, given the role of the judge in a democracy?* Guiding my attempts to answer these questions is a post-foundational theoretical framework (developed in chapter two) that acknowledges a lack of ultimate meaning, other than that made by humans in political activity. Within this meaning-making political activity, crisis discourse is a powerful tool. I define crisis discourse as a type of speech act that discursively constructs a threat, claimed to be caused by an other, that is seen as requiring fundamental change to political and legal structures.

In addition to the introduction (chapter one), the theoretical framework (chapter two) and a concluding chapter (chapter seven), this dissertation comprises four substantive chapters. Chapters three, four and five have been published or are based on articles that have been published in academic peer-reviewed journals. I will summarize the results relevant to my two main research questions below.

The Force of Crisis Discourse on Judicial Decision-Making

From the case studies this book explores, four elements emerge of the force crisis discourse can have on judicial decision-making and of how this force is exerted. The first of these elements is that crisis discourse is capable of rupturing hegemonic discourse and of creating new discourses from the elements of those that are ruptured. My analysis of crisis discourse in the War on Terror (chapter three) reveals that crisis discourse can act in this way in relation to legal discourse employed by judges in their judicial decisions. I discuss how crisis discourse succeeds in rupturing the previously dominant discourse on terrorism (one based on criminal prosecution) and in replacing it with a new approach based on precaution.

The second element of crisis discourse that this study discusses (in chapter four) is its ability to discursively create and position a 'people' who is seen as the legitimate decider of social meaning over and against an 'other' whose presence threatens the existence of the people. I argue that this ability is, in fact, what gives crisis discourse its capacity to rupture and reconstitute hegemonic discourses.

The third and fourth aspects of the impact of crisis discourse on decision-making are not

unique to crisis discourse, but do become more apparent in cases dealing with crisis. In chapter five, this book highlights that even the most forceful crisis discourse can never fully succeed in stabilizing the meanings it gives to events, nor the identity of the people that is set against the other. I argue that this lack of final stabilization is a feature of all discourses, including legal ones, and that as a consequence the judge is pulled into a hegemonic struggle over legal meaning. While this struggle is highly structured by discourses (both ones of legal and crisis-related natures), these discourses can never fully determine the judge's decision. In this way, whether consciously or not, crisis discourse forces the judge into a hegemonic struggle over meaning-making and this is the third aspect of crisis discourse this study reveals. Chapter six discusses the fourth and final element of crisis discourse, namely that judges cannot escape their role in the hegemonic struggle highlighted by crisis discourse by showing deference to the legislature or the executive. Even in the most marginal of review, the judge is forced to make substantive decisions that, although structured by the force of hegemonic discourses, at the same time, retain an aspect of undecidability as they cannot find full and final ground in previous decisions. This structured undecidability confronts the judge with the question of how to decide in the face of this residual ambiguity.

The Agonistic Judge

My examination of these four aspects of crisis discourse and the structured undecidability they reveal brings me to the conclusion I set out in chapter seven: in order to decide legitimately, the judge must acknowledge that despite her best efforts, her decision will never be fully-inclusive. Despite her most diligent attempts to follow the law, she can never be certain she has made the right decision. The judge must acknowledge this by ensuring that her decision does not result in the permanent entrenchment of the exclusion it inevitably creates. In this way, the judge ensures the preservation of contestation over what is the right and wrong decision. I link this criterion to Claude Lefort's reflections on democracy as an order in which power must constantly search for legitimacy. Moreover, as Lefort explains, in a democracy the only basis for legitimacy is found in the very debate over what is legitimate and what is not, instead of in some final appeal to truth or right. In order to preserve the never-ending debate that Lefort calls for, the other who is excluded by the judge's decision must remain in a position to contest the structures of discourse that are used to justify his exclusion. I argue that this criterion for legitimacy in the face of structured undecidability means, in the context of the judiciary, that the judge must show responsibility for the *output* of her decision as well as for the *input* to her decision. In doing so, the judge must ensure that at neither point in the decision-making process the other is permanently and irreversibly excluded.

In the context of responsibility for the *output* of the decision, the judge must attend to how her decision affects the participation of the other in future legal and political contestation. Legitimacy is found here in the refusal of the judge to decide in a way that would

permanently and *irreversibly* prevent the other from being able to challenge the legal and political meaning that led to their exclusion. Concretely, this means preventing 'legal invisibility'; a state of being in which one is not recognized as a subject able to have legal and political rights under law, and is instead treated as a passive object of the law.

In addition to this attention to output, I additionally call on the judge to attend to the *input* to her decision: to the discourses that provide the structure to her interpretation of the law. The judge must facilitate the other's ability to participate in the contestation over the discourses that inform the judicial decision, at the front-end of the decision-making process. I give a number of suggestions for how a judge might ensure this type of input to her decision, including acknowledgment of the exclusionary nature of the people, hearing challenges to hegemonic discourses by the excluded other and the active facilitation and encouragement of amicus curiae submissions from the excluded other. These more procedural suggestions must be accompanied by a judicial attitude of openness by which the judge allows her deepest legal and political convictions to encounter contestation by the excluded other.

In the end, the judge must decide. She must do so realizing that her decision will exclude, yet that it must not do so permanently.

Agonistic Citizen

The judge that facilitates contestation cannot succeed in creating a more just legal institution if this facility for contestation is not actively engaged in by agonistic citizens. This dissertation is a call for citizens in general and lawyers in particular to engage passionately in debates over legal interpretation, to engage in litigation that pushes the boundaries of current interpretations and to realize while doing so that these debates and this litigation is at its core about who the true people is who can rightfully decide on social and legal meaning. In their engagement with the law, citizens and lawyers who bring claims that challenge the current conception of the people and their interpretations of the law are a vital component of agonistic institutions, as are citizens who partake in expressions of counter-hegemonic discourse in ways that are made available to judges in the input to their decision. This can be done by participation in amicus curiae submissions, but also through forms of political expression and in forms of cultural expression such as literature and art.

My attention to crisis discourse leads me to particularly call on citizens and lawyers to realize the potency of 'speaking crisis'. Crisis discourse is a discourse that is strongly suited to conflict over meaning-making and to participation in debates over what it means to be excluded, who is rightfully excluded, and what permanent exclusion entails. In this sense, I by no means *discourage* its use. To the contrary, it is precisely this type of discourse that can lead to the greatest shifts in conceptions of who is included in the political community and

who is not and, from my agonistic perspective, it is precisely these shifts that must remain possible always again.

I do, however, issue a word of caution to the agonistic citizen who uses this discourse: the realm of antagonism, the realm of the permanent destruction of the other, is never far away. She who employs crisis discourse finds herself on a continuum of risk and she risks devolving into the realm of antagonistic interaction between enemies aimed the final and ultimate destruction of all difference. Yet, avoiding all othering and difference is also not a solution. While antagonism might be anti-political as it destroys the politically necessary other, its polar opposite, pure pluralism, is apolitical as it refuses to negate any difference, refuses to engage in any othering and thus fails to engage in the political move toward representation of the people. The realm of politics is found in between, and the agonistic citizen must traverse this continuum with the conviction of her most deeply held beliefs intact, while - at the same time - recognizing she can never be sure.