

BOOK REVIEW/ COMPTE RENDU

Baghai, Katayoun. *Social Systems Theory and Judicial Review: Taking Jurisprudence Seriously*. Surrey, UK: Ashgate. 2015, 179 pp. \$119.95 hardcover (1409454029)

How does law contribute to the functioning of contemporary society? In an increasingly complex social world, what role does law play in the structuring of social life? While there are seemingly enumerable references to sovereign power's victory over the rule of law, how do we make sense of intersystemic relations in the pursuit of social integration? *Social Systems Theory and Judicial Review: Taking Jurisprudence Seriously* is an attempt to elucidate these questions while illustrating the usefulness of Niklas Luhmann's social systems theory for our understandings of the legal system in modern society. Katayoun Baghai makes the provocative claim that judicial decision-making in the context of modern legal systems cannot be understood entirely without reference to the legal system itself. The author specifically explores variations in US Supreme Court jurisprudence of constitutional provisions regarding freedom and equality while identifying how the Court creatively justifies its decision-making. The result is a fascinating sociology of juridical review that is simultaneously well argued, empirically grounded, and anti-reductionist. Yet, because of its high-level theoretical orientation, it may be inaccessible to a broad readership. Sociologists, legal scholars, and even legal professionals would be interested in this book, but students and scholars not familiar with systems theory will find it to be a challenging, and at times esoteric, read.

To make sense of the relationship between law and politics, Baghai begins by pointing out that classical and contemporary sociological debates about law and society have relied, in one way or another, on a model of society as a 'whole' made up of interconnected parts, whereby law is approached in terms of integrative functions (9). Against this backdrop, the author distinguishes a systems-theoretical approach of the function of law to establish and temporally stabilize normative expectations irrespective of counterfactual examples. Thus, moving beyond conflict and consensus perspectives, the author considers, in typical Luhmannian fashion, the value of approaching law as a functionally differentiated, autonomous subsystem of society.

In the first of five chapters, Baghai positions rights-based judicial review in terms of social systems theory and constructs the analytical framework upon which the analysis is based. Following a discussion of how fundamental rights principles form the basis of law's functional differentiation, Baghai focuses on the functional differentiation of law in order to redefine how sociologists of law think about the relationship between law and other influential subsystems of society. The book's middle chapters are devoted to empirical analyses of juridical review in relation to racial exclusion, affirmative action programs, and freedom of religion.

Some of the author's most interesting observations appear in the book's discussion of the Court's post-World War II jurisprudence of race and racial inclusion/exclusion. Baghai demonstrates that the Court was able to deny African Americans equal protection of law by grounding its decisions in legal doctrine, rather than justifying legal distinctions in something from outside the law. Although this suggestion might irritate critical race and conflict theorists, Baghai offers abundant empirical examples that form the basis for understanding how the Court recognizes social contexts (i.e., intrasystemic communications) while remaining functionally differentiated from other social systems. Furthermore, Baghai convincingly illustrates how the Court's inconsistent application of legal principles with respect to freedom of religion provide partial justification for controversial state actions (i.e., the maintenance of secular character of public education). The apparent "doctrinal chaos" (101) produced by the system contributes to the autonomy of law and thus also grounds and limits religious accommodation through the eyes of the court.

The book concludes with an examination of privacy regulations as emblematic of social complexity. Baghai demonstrates that privacy regulations can be considered, rather than simply protections of personal freedom, as structural couplings between self-referential social systems. In other words, law's construction of contingent legal meanings of privacy represent its 'loose compatibility' with other social systems, most notably politics, economy, and science, yet legal meanings of privacy are maintained through the legal system itself. The Court's ruling on police searches of cell phone data provides but one example of this phenomenon. Here Baghai further shows that the courts settled tensions between the political and legal systems with respect to privacy rights through observing extra-legal communications as part of the legal system. Most interesting in this respect is the recoding of police action as valid legal communication in the form of warrants for

search and seizures. While it may be an odd inclusion in this particular book, Baghai's preliminary exploration of privacy jurisprudence is both timely and necessary in our current climate of seemingly endless examples of illegitimate police conduct, corruption, and abuses of power.

Baghai seems to eschew the charismatic qualities of those actors with decision-making power within the United States juridical system. Since Max Weber, sociologists acknowledge that understandings of political legitimacy based on a system of laws can distinguish legal authority from charismatic authority. While legal authority (i.e., authority based on a system of laws) is typical of the modern state, Anglo-American law relies on court decisions and judges still have charismatic qualities. Theoretical and epistemological challenges to this perspective need not be recounted here, but part and parcel to the book's systems-theoretic orientation is the distinction between social action and *communication*. While Baghai does a fine job of conceptualizing legal communication, a more explicit dialogue of the role of individual actors' discretion within a systems-theoretic perspective would have been useful, particularly so for those unfamiliar with Luhmann's theory.

Although Baghai provides a thorough and adequate reading of Luhmann's social systems theory as it relates to judicial review, in the end I was left wondering whether this text is really meant to bridge the present disjuncture between jurists and the social sciences, or whether it is yet another attempt at the operational closure of the social systems framework itself. For if the present disconnect between jurisprudence and sociology of law can, as Baghai suggests, be overcome by turning to a systems-theoretical approach, why has Luhmann's perspective continued to be marginalized in sociology of law and in jurisprudence alike? Part of this could be due to the perceived inaccessibility of Luhmann's theory to a general audience, to the selective nature of scientific communications, or perhaps it could be due to a nepotistic use of the perspective by Luhmannians that contributes to the establishment and maintenance of the theory's system-environment. While it is impossible to address these questions here, this book presents a thought-provoking account of juridical review in the United States. Sociologists, legal scholars, and those interested in external observations of juridical decision-making would benefit from adding this book to their respective libraries.

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