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A Sociological Perspective on the Internal Laws of Religions

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Over the last 30 years, work at Cardiff University by my colleagues and I have identified and shaped the study of law and religion in England and Wales and have explored its interdisciplinary interaction with theology, history and sociology. This article draws upon, summaries and develops my previous work on the interaction between law and religion and the sociology of religion to focus in on particular on what could be achieved by employing a sociological perspective to the internal laws of religions. It falls into two sections. The first will explore the merits of a sociological approach to religious law generally while the second will focus on how the internal laws of religion can be better understood through application of social systems theory.

The English Reformation was a watershed moment in both the regulation of religion in England but also in relation to the study of the regulation of religion. As Elton has commented, England "wore her Reformation with a difference."[1] The divorce from Rome in the 1530s under Henry VIII was not a religious upheaval that required political and constitutional reconstruction; it was a political and constitutional act that led in time to religious upheaval. The effects of the sixteenth century and the ousting of the Roman Catholic Church with its authority in Rome and its replacement with the Anglican Church of England continues to shape or at least underpin much of what I have called "religion law" in England: that is, the rules developed by the state that affects religious groups and individuals. The Reformation shaped the legal status (and later the religious persuasion) of the English Church: A flurry of Reformation statutes saw the King become recognized as "the only supreme head in earth of the Church of England."[2] The law of the Church of England is part of the law of the land and is therefore in a different legal position than other religious groups.

The English Reformation also affected the study of what we today call Law and Religion. The study of canon law – now seen as foreign and as a means of subverting the authority of the King and his Church – was banned at the universities. To the extent that the law of the church was studied at all, it became a matter for practitioners. When other faiths became lawful, their rules and regulations were largely a matter for them, and these too were not studied academically but were left instead to the internal bodies of the religions in question or the practitioners that they engaged. This continued to be the case for centuries. In 1991, however, this changed but the change did not occur in England but in neighboring Wales. At Cardiff University, Norman Doe – then best known as a legal historian – began asking where all the church laws he had noted in his medieval research had gone. This stimulated an interest in the law of the Church of England, which then spread to the law of other churches and also to the law of the state applicable to religions; in other words, it grew to encompass the study of what I called religious law and religion law. Other academics and practitioners showed an occasional interest in some of these matters, but it was Doe who broke the mold by actually teaching it. He set up a master's course in Canon Law at Cardiff University, followed by a Centre for Law and Religion in the next decade which became the hotspot for scholarly activity on the topic in the UK. Cardiff founded and hosted meetings of a Law and Religion Scholars Network. A claim could be made that Doe was responsible for the development of Law and Religion as an academic subject in the UK.

In 2004, Doe went further again and proposed the establishment of another new discipline, "a sociology of law on religion" which "places law on religion in the context of the sociology of religion, and the sociology of religion in the context" of law in order "to stimulate discussion of the ways in which these disciplines may enrich each other."[3] Doe proposed that a "sociology of law on religion" emerged as "a fourth and obvious discipline" from three existing "distinct disciplines": what he referred to as the law of religion, the sociology of religion, and the sociology of law. He defined this proposed new discipline as "the study of the relations between society, religion and law, and in particular, the distinctive role of law in sociology of religion: the place of law in relations between society and religion, and how the treatment of questions fundamental to the sociology of religion may be enriched by an understanding of their juridical dimensions."[4]

If attention is given to the essential definitions of each of the three disciplines Doe names then it could be said that the need for a "Sociology of Law and Religion" arises as a matter of logic: Law and Religion is the study of the relations between religion and law; the Sociology of Religion is the study of the relations between society and religion; and the Sociology of Law is the study of the relations between society and law.[5] None of these disciplines in isolation can therefore understand the relations between religion, law, and society. Each discipline is missing one element. Law of Religion omits the study of society; the Sociology of Religion misses the study of law; and the Sociology of Law neglects the study of religion. If the focus of the study is the relationship between all three variables – religion,

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1 *Geoffrey R. Elton*, The Reformation in England, in: Elton (ed.), The New Cambridge Modern History Volume 2: The Reformation, 1520–1559 (2nd edition, Cambridge 1990), 262.

2 Act of Supremacy 1534.

3 *Norman Doe*, A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe, Law and Justice 152 (2004), 68, 92.

4 Ibid.

5 *Russel Sandberg*, Religion, Law and Society (Cambridge 2014), 228.

society, and law – then a single disciplinary approach will not suffice and a synthesis of all three sub-disciplines is needed.

My doctorate, subsequently published as a monograph, developed this further and looked at the value and potential of a sociological approach to Law and Religion. The monograph paid particular attention to the secularization thesis and included a chapter on a sociological approach to religious law. It ended by arguing that we need to explore particular sociological approaches and how they could apply to and seek to understand religious law. My subsequent work has done precisely that by looking at the social systems theory purported by Niklas Luhmann.[6] This article draws upon, summaries, and develops my previous work to focus in particular on what could be achieved by employing a sociological perspective to the internal laws of religions, by drawing upon but also developing my previous work on the subject. It falls into two sections. The first will explore the merits of a sociological approach to religious law generally, while the second will focus on how the internal laws of religion can be better understood through application of social systems theory.

I. A SOCIOLOGICAL APPROACH TO RELIGIOUS LAW

Doe contended that law is a "necessary aspect of sociology of religion" in that it provides a "critical focus" which is able to "test" sociological hypotheses.[7] He wrote that: "law provides a concrete test to determine and verify the commitment of society (in the case of state law) and religious organisations (in the case of religious law) to actual developments articulated in propositions of the sociology of religion."[8] Separating religious groups from the society in which they operate is difficult, however. Developments in religious law often incorporate the language, culture, and standards that are found in state law becoming more rationalized and bureaucratic. Examples of this include the proliferation of guidance[9] and the codification of principles such as those found in worldwide Anglican canon law.[10] Such evidence of secularization within religious groups merits discussion as the final level of secularization, as identified by Karel Dobbelaere, namely secularization at the organizational (or meso) level.[11] This is more commonly referred to as "internal secularization." For Chaves, this can be defined as "the process by which religious organizations undergo internal development towards conformity with the secular world."[12] Internal secularization refers to the process whereby religious groups and institutions achieve what Larry Shiner described as "conformity with 'this world'."[13] As Michael Hill put it, this refers to "the shift from 'other-worldly' to 'this worldly' orientations within religious groups themselves."[14] The ideas embodied in the concept of internal secularization can be traced back to the work of Max Weber, not least the distinction between "other worldly" and "this worldly" concerns and his prediction of the "disenchantment of the world." As James Beckford has noted, the concept of internal secularization can be found in Weber's "concern with the ways in which religious inspiration and enthusiasm are institutionalised, are revived from time to time, but are eventually routinised in forms which compromise their vitality or purity"; the roots of internal secularization can be found in Weber's "central preoccupation ... with the close but ironic relationship that he detected between religions and rationality."[15]

Five successive but overlapping phases of internal secularization can be inferred from the sociological literature, namely: polarization, pluralization, bureaucratization, moderation, and adaptation. For each of these phases, reference can be made to the internal laws of religion to "test" the sociological hypothesis. The first phase, polarization, was developed in the early work of Peter Berger. For Berger, religion became polarized in the sense that it became attached to only certain sections of social life, most notably "the institutions of state and family."[16] Rather than being part of all aspects of life, religion became linked to only certain aspects. It became accepted that "religion stops at the factory gate." Religious sanctions were not directly replaced but were superseded. Many of the issues which religious teaching had focused on were no longer considered to be matters of for social regulation. The social functions of religious groups narrowed. This was a consequence of social differentiation. Reference to religious law can provide evidence to measure polarization in terms of looking at the changing subject matter of religious laws and how they defer instead to state law on certain

6 See especially *Russell Sandberg*, A Systems Theory Reconstruction of Law and Religion, Oxford Journal of Law and Religion 8 (3) (2019), 447.
7 *Norman Doe*, A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe, Law and Justice 152 (2004), 68, 91.
8 Ibid., 68.
9 This is epitomised by the growth of quasi-legislation, on which see *Norman Doe*, Ecclesiastical Quasi-Legislation, in: Doe/Hill/Ombres (eds.), English Canon Law (Cardiff 1998), 93.
10 The Principles of Canon Law Common to the Churches of the Anglican Communion (Anglican Communion Office, 2008). On which see *Norman Doe*, The Contribution of Common Principles of Canon Law to Ecclesial Communion in Anglicanism, Ecclesiastical Law Journal 10 (2008), 71.
11 *Karel Dobbelaere*, Secularization: An Analysis at Three Levels (Belgium 2002).
12 *Mark Chaves*, Intraorganizational Power and Internal Secularization in Protestant Denominations, American Journal of Sociology 99 (1) (1993), 1, 3; *Mark Chaves*, Secularization as Declining Religious Authority, Social Forces 72 (3) (1994), 749, 757.
13 *Larry E. Shiner*, The Concept of Secularization in Empirical Research, Journal for the Scientific Study of Religion 6 (2) (1967), 207, 211-212.
14 *Michael Hill*, A Sociology of Religion (London 1973), 234.
15 *James A. Beckford*, Social Theory & Religion (Cambridge 2003), 37.
16 *Peter Berger*, The Sacred Canopy (New York 1967), 129.

matters such as marriage status. The changing rules on discipline – who is bound and what the effect is – also might provide evidence of polarization or refute the hypothesis by showing that this trend has not been played out or has occurred differently.

Polarization was furthered by the second phase, which Berger has referred to as the pluralization of religion. He observed that historically religions had "existed as monopolies in society."[17] There was only one lawful Church, which served as a regulatory agency for "both thought and action," meaning that there was no need to distinguish between religious and non-religious matters and no natural limits to their influence and competence. This was changed by the Reformation and the growth of religious tolerance that slowly followed it. Religious pluralization meant that religious adherence became voluntary and a matter of choice. This affected the role of religious groups within society. They now began to operate "as a pressure group pursuing sectional interest."[18] The allegiance of believers could no longer be taken for granted. A market place came to exist and this leads to the rationalization of socio-religious teachings and well as the reduction of competition, reduced through mergers. Evidence for this could again be found in the internal rules of religions such as in changing rules on membership and rites of passage and deference to state laws on this. It would also be evident in how religions dialogue with the state: for example, how the historical churches now reposition themselves to claim to represent faith generally.

For Berger, this growth of the religious marketplace expresses itself primarily in the phenomenon of bureaucracy, the third phase of internal secularization. For Berger, the "spread of bureaucratic structures through the religious institutions" led religious institutions to "increasingly resemble each other sociologically."[19] He wrote that that bureaucratization would result in "standardization and marginal differentiation."[20] Religious laws can provide a case study of this, exploring whether they increasingly use language and an approach set by state standards – and dealing with different topics. In this phase of secularization, although differences continue to exist within the individual "polity" of each religious tradition, these differences are often skin deep. Bureaucratization laid "a social-psychological foundation" for ecumenicity in that "religious rivals are regarded not so much as 'the enemy' but as fellows with similar problems."[21] This is reflected in the way in which ministers of religion are increasingly seen legally as employees and how rules permit the sharing of religious buildings. The differences in the details (such as in the names given to religious personnel and the allocation of roles) hide the similarities that exist, particularly in terms of the social roles played. Reference to religious law also supports this argument. Within the Anglican Communion, for instance, it has proved possible to identify 100 principles of canon law common to the Churches of the Anglican Communion.[22]

The move towards ecumenism is also linked to the fourth phase of internal secularization: moderation. This is elucidated most clearly in Steve Bruce's secularization paradigm. For Bruce, social, cultural, and religious diversity meant that these voluntary religious associations moderated over time.[23] He observed that whilst the histories of all major religious traditions witness "phases of moderation alternating with radicalism," during the period of modernization within Western Europe "those cycles operated within a general pattern of decline, so that each wave of radicalism was smaller than its predecessor."[24]

He contended that the loss of authority furthered by pluralism led most religious groups to "reduce the claims they make for the uniqueness of their revelation and come to view themselves as just one thing among others."[25] However, as both Peter Berger and Bryan Wilson suggest, not all religious groups are content to accept a curtailed social role.[26] Rather, religious groups are faced with "two ideal-typical options": accommodation or resistance.[27] Some religious groups choose the second option: they entrench themselves and often "react by sacralising aspects of their beliefs, rites, and moral standards."[28] Most groups, however, take the first option or adopt one of the "various intermediate possibilities between these two ideal-typical options, with varying degrees of accommodation and intransigence."[29] The internal laws of religions can again be used to substantiate this hypothesis. Indeed, the two ideal typical options have actual-

17 Ibid., 135.
18 *Bryan R. Wilson*, Reflections on a Many Sided Controversy, in: Bruce (ed.), Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis (Oxford 1992), 195, 201.
19 *Peter Berger*, The Sacred Canopy (New York 1967), 139. As Oliver Tschannen observes: "They all apply the same principles of bureaucratic efficiency and they all attempt to increase their appeal by catering to the psychological needs of individuals. In this sense, they all become more worldly": *Oliver Tschannen*, The Secularisation Paradigm: A Systemization, Journal for the Scientific Study of Religion 30:4 (1991), 395, 409-410.
20 *Peter Berger*, The Sacred Canopy (New York 1967), 148.
21 Ibid., 141.
22 The Principles of Canon Law Common to the Churches of the Anglican Communion (Anglican Communion Office, 2008). It has also been contended that it is possible to perform a similar task in relation to the laws of Christian churches generally: *Norman Doe*, Christian Law: Contemporary Principles (Cambridge 2013).
23 *Steve Bruce*, God is Dead: Secularization in the West (Oxford 2002), 4; *Steve Bruce*, Secularization: In Defence of an Unfashionable Theory (Oxford 2011), 27.
24 Ibid., 34-35.
25 *Steve Bruce*, God is Dead: Secularization in the West (Oxford 2002), 25.
26 *Bryan R. Wilson*, Religion in Secular Society (London 1969), 86; *Peter Berger*, The Sacred Canopy (New York 1967), 153.
27 A similar notion underlines Roy Wallis's distinction between world rejecting and world affirming New Religious Movements: *Roy Wallis*, The Elementary Forms of the New Religious Life (London 1984).
28 *Karel Dobbelaere*, Secularization: An Analysis at Three Levels (Belgium 2002), 22; *Peter Berger*, The Sacred Canopy (New York 1967), 153.
29 *Peter Berger*, The Sacred Canopy (New York 1967), 152-153.

ly been recognized by the judiciary. In *Re G (Children)*[30] Munby LJ noted that:

> For the nominal Anglican, whose sporadic attendances at church may be as much a matter of social convention as religious belief, religion may in large part be something left behind at the church door. Even for the devout Christian attempting to live their life in accordance with Christ's teaching there is likely to be some degree of distinction between the secular and the divine, between matters quotidian and matters religious. But there are other communities, and we are here concerned with such a community, for whom the distinction is, at root, meaningless, for whom every aspect of their lives, every aspect of their being, of who and what they are, is governed by a body of what the outsider might characterise as purely religious law. That is so of the devout Muslim, every aspect of whose being and existence is governed by the Quran and the Sharia. It is so also of the ultra-orthodox Jew, every aspect of whose being and existence is governed by the Torah and the Talmud.

Those groups that accommodate reach the fifth and final phase of internal secularization: adaptation. As Wilson notes, this entails accepting "the intellectual assumptions of contemporary society" by adjusting particular beliefs whereby new "permissive" attitudes are taken.[31] There has been a move "from being the arbiters of moral behaviour the Churches have steadily become more like reflectors of the practice of the times, gradually and hesitating endorsing change."[32] These changes are seen, for instance, in the pastoral function of religious groups as shown by the example of attitudes towards healthcare. Wilson noted that for centuries "the Church regarded illness and affliction as the will of God to which resignation, fortitude, and prayer were the appropriate responses for the devout Christian."[33] Such beliefs are no longer accepted: instead, "in modern societies vast sums of money are deployed in direct contravention of such a proposition." For Wilson, it is now implicitly accepted that "the world is less God-given than man-made and is subject to man's further amendment." Reference to religious law can again provide evidence to support, refute, or nuance this sociological hypothesis. It can highlight secular state standards found in religious laws both in terms of form and content. For instance, it can be questioned whether religious laws are now less focused on general morality or tend to be written in a legalistic manner.

The five phases of internal secularization should not be regarded as a linear or inevitable process. Different religious organizations reach different phases at different times and there are movements back and forth, depending upon the issue and context. Yet, accounts of internal secularization may seem to provide another example of what Charles Taylor has called "subtraction stories"[34]: They provide an account of things that the historical churches used to do. Reference to religious law provides the evidence base for internal secularization. Examining the internal rules of religions and how they have changed or not changed over time can support, challenge, or complicate the sociological theory. In the same way as the growth of law and the development of state law on religion provides evidence of societal secularization, the growth and development of laws and regulatory instruments developed and enforced by religious groups themselves is likely to provide material to further understand sociological propositions regarding internal secularization. A sociological approach to religious law is therefore necessary given that religious law provides an important indicator of the identities of religious groups and how they see other social institutions.

This can be highlighted by an empirical project in which I was involved that sought to compare systems of religious adjudication across three faiths in relation to marriage and divorce.[35] We found that to varying extents, the tribunals had adopted the habits, customs, and behavior of "secular" law courts. The Beth Din building, for instance, included an impressive "court room" which was not dissimilar to a modern county court room. And all of the tribunals followed precise processes, had written and oral proceedings, and all three tribunals charged clients for their services. They were concerned with being accessible and user-friendly and showed deference towards the state, by encouraging the parties to obtain a civil divorce if applicable before seeking a religious termination and by advising clients to make use of civil law mechanisms and remedies. However, there was also evidence that refuted the idea of internal secularization. We found evidence against differentiation in that tribunals not only existed but were busy, vibrant institutions which played an important role in the lives of some believers. The tribunals had not become functional analogues of the civil courts, or some form of "alternative dispute resolution." And

30 [2012] EWCA Civ 1233.

31 *Bryan R. Wilson*, Religion in Secular Society (London 1969), 204.

32 Ibid., 86. Robert Bellah observes that: "standards of doctrinal orthodoxy and attempts to enforce moral purity have largely been dropped. The assumption in most of the major Protestant denominations is that the church member can be considered responsible for himself": *Robert N. Bellah*, Religious Evolution, American Sociological Review 29 (3) (1964), 358, 373.

33 Ibid., 204.

34 *Charles Taylor*, A Secular Age (Harvard 2007), 22.

35 See *Gillian Douglas/Norman Doe/Sophie Gilliat-Ray/Russell Sandberg/Asma Khan*, Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts (Cardiff project report 2011) and *Russell Sandberg/Gillian Douglas/Norman Doe/Sophie Gilliat-Ray/Asma Khan*, Britain's Religious Tribunals: "Joint Governance" in Practice, Oxford Journal of Legal Studies 33 (2) (2013), 263.

interviewees were keen to stress the religious nature of their work. An interviewee at the Catholic tribunal told us:

> We can't simply make religion into a system of laws and rules and regulations, Christ himself was very clear about that and he criticised the Pharisee's and the Scribes and the lawyers of his day for doing that. So what one doesn't want to do is to fall into the trap of becoming locked in a legal mindset, you have to have a legal mindset or the ability to adapt to working within judicial structures and disciplines but at the same time you have to retain a pastoral sensitivity and remember that you are also, in your role as a church lawyer, you are trying to help people and you are trying to help people to re-build their lives spiritually speaking and also emotionally and socially after the trauma of the breakdown of a marriage relationship so it requires a certain ability to blend those two skills and to remember that you are a lawyer but you are still a priest and a priest first and foremost.

II.
A SOCIAL SYSTEMS THEORY APPROACH TO RELIGIOUS LAW

The discussion above, like the work of Doe, has assumed that there is such a thing as *a* sociological perspective. In reality, however, there are a number of sociologically perspectives. The work of Karl Marx has given rise to a number of structural sociological theories that stress that society is based on conflict including the work of the Frankfurt School and critical theory. The work of Émile Durkheim has inspired a number of structural sociological theories that stress that society is based on consensus including the functionalist work of Talcott Parsons and the social systems theory of Luhmann. And the work of Max Weber has led to a number of social action perspectives which includes symbolic interactionism and ethnomethodological approaches. Any of these approaches (and any of the vast number of other approaches that this overview does not mention) would provide a different sociological understanding of the internal laws of religion. The following will explore how the social systems theory of Luhmann as a case study of what can be achieved by employing a particular sociological theory and perspective.

Niklas Luhmann is one of a small number of sociologists whose work has contributed to both the sociology of law and the sociology of religion. However, his work and those who have applied it have to date focused on law and religion in isolation. In part, the reluctance of law and religion scholars to engage with Luhmann is understandable; he is a controversial and divisive figure on account of the complexity, mass, and denseness of his work. Luhmann's argument is controversial because he took what was already an often-derided social theory – Parsons's general systems theory[36] – and then developed it a way that represented a significant break with (and therefore challenge to) long-standing sociological orthodoxies. For Luhmann, social and political theory following the Enlightenment erred in being "obsessively preoccupied" with the essence or nature of the human being and therefore lacked the means by which it could comprehend "the social as such."[37] Luhmann did not abandon the theoretical plan behind the Enlightenment but dismissed "its claim that people, not systems, are at the origin of social evolution."[38] Rather, the social change that resulted from the Enlightenment – the rise of reason and the rationalization of society – was not the result of the actions of people but of systems. However, Luhmann's theory is not anti-human; it is no more so than the grand theories of Marx or Durkheim. Like those theories, it is a social theory: a theory of society rather than psychological-organic systems.[39]

Luhmann's social systems theory, then, focuses upon social systems as the primary unit of analysis and how these systems consist of communications, not of people. It rests upon the notion of functional differentiation – how now a number of social systems exist which each fulfil a different function. Modern society is functionally differentiated into autonomous social systems such as law, religion, politics, science, and the media. Each social system is self-referential and reproduces itself through communication. Systems confront events and communications from outside which are then "transformed or re-constructed" by the particular social system via structural coupling. This means that systems can be coordinated but autonomous. Social systems define themselves based on self-description: As systems reproduce themselves, they also define themselves by distinguishing themselves from other social systems. Law (like all social systems) reproduces itself by communication. The legal system defines and distinguishes itself through communication. It applies the binary code of legal/illegal and has the function of "stabilization of normative expectations." Any communication that has this function and uses the legal/illegal code becomes part of the social system of law.

36 Laermans, and Verschraegen note that the "general aversion to systems theory in the post-Parsonian age was probably also responsible for the striking lack of interest" in Luhmann's theory within the sociology of religion: *Rudi Laermans/Gert Verschraegen*, "The Late Niklas Luhmann" on Religion, Social Compass 48 (1) (2001), 7, 9.

37 *Michael King/Chris Thornhill*, Niklas Luhmann's Theory of Politics and Law (London 2003), 132.

38 Ibid., 133. This leads to further complexity since as King and Thornhill (ibid., 147) note it means that "Luhmann's sociology is extremely contradictory and dialectical, for it expressly contains both a critique and an endorsement of the defining components of liberal political theory and philosophy."

39 *Niklas Luhmann*, A Sociological Theory of Law (2nded., London 1983/2014).

A systems theory approach provides an explanation for why legal actors typically pay little attention to religious law and why they often regard the existence of sharia law and sharia courts as being controversial. Under systems theory, religious adjudication offends functional differentiation which sees law and legal adjudication is the proper business of the legal system only. However, systems theory does not provide merely the diagnosis to the problem of the neglect and misunderstanding of religious law: it also provides the cure. Luhmann's approach embraces legal pluralism, defining law as a communication. For Luhmann:

> All collective life is directly or indirectly shaped by law. Law is, like knowledge, an essential and all-pervasive fact of the social condition. No area of life – whether it is the family or the religious community, scientific research or the internal networks of political parties – can find a lasting social order that it not based on law. Collective social life embodies normative rules which exclude other possibilities and lay to be binding with a degree of success. This is always so, although the degree of technical formulation and the extent to which behaviour is determined vary from area to area. However, a minimum amount of legal orientation is indispensible everywhere.[40]

Luhmann's understanding of law is not limited to state law. It accepts legal pluralism, the notion that "it is normal for more than one 'legal' system to co-exist in the same social arena."[41] A systems theory approach to legal pluralism transforms the concept of legal pluralism.[42] Applying systems theory, legal pluralism is "defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal."[43] Systems theory therefore provides a methodology for the distinction and description of law as opposed to other social or doctrinal norms. Luhmann's great contribution is therefore to overcome what I have referred to elsewhere as "the failure of legal pluralism"[44]: the way in which legal pluralist theory, while rightly rejecting legal centralism by asserting the normality of there being more than one "legal" system co-existing in the same social arena,[45] does not then provide a means whereby such "legal" norms can be identified and distinguished from other forms of social control. A social systems approach shows that we can recognize legal pluralism but yet still distinguish law from social norms. As law defines itself through its own communications, law as a social system perpetuates itself. A systems theory approach means that social norms can be distinguished from legal norms.

This transforms the discussion of religious law. It moves it on from the question of *whether* religious law is law (a discussion invariably shaped by a state-centralist account) to the question of *when* religious law is law; or, more accurately when religious communications are legal. The question of what is religious law is not answered by reference to institutions but is rather dependent upon the particular communication. Religious decision-making bodies, whether they are the Governing Body of the Church in Wales, a sharia tribunal or a Quaker meeting, all produce legal as well as non-legal kinds of communication. Whenever they produce communications based on the binary code lawful/unlawful then that, according to systems theory, is law.

A systems theory approach allows us to take a further step. Applying Luhmann's theory, we can regard religious legal orders as social systems in their own right. They can be regarded as social systems that simultaneously apply both legal and religious codes. Religious legal systems combine the binary coding and functional specifications of the two social systems of law and religion.[46] The notion that social systems could produce further systems is recognized in Luhmann's theory, which stated that "we have to presuppose it is possible to form further autopoietic systems within autopoietic systems."[47] He wrote that "differentiations become conditions for further differentiations" and that religious organizations provided an example of "autopoietic systems that operate on their own."[48] However, to date, there has been no discussion of this idea that religious legal systems could operate as social systems. Rather, it is assumed that the continued operation of religious legal systems provides a sign of de-differentiation. It is assumed that the endpoint in a purely functionally differentiated society is that religious institutions simply should not use the communications of another social system like law. This is why sharia councils and other forms of religious tribunals are therefore treated with ill ease.

40 Ibid., 1.

41 *Brian Z. Tamanaha*, A General Jurisprudence of Law and Society (Oxford 2001), 171.

42 See also *Richard Nobles/David Schiff*, Using Systems Theory to Understand Legal Pluralism: What Could be Gained?, Law and Society Review 46 (2) (2012), 265.

43 *Gunther Teubner*, The Two Faces of Janus: Rethinking Legal Pluralism, Cardozo Law Review 13 (1991), 1443, 1451.

44 *Russell Sandberg*, The Failure of Legal Pluralism, Ecclesiastical Law Journal 18 (2016), 137.

45 This approach is epitomised by Kelsen's "pure theory of law": *Hans Kelsen*, The Law as a Specific Social Technique, University of Chicago Law Review 9 (1941), 78; *Hans Kelsen*, Pure Theory of Law (California 1967).

46 This develops the argument that religious law is necessarily and by definition both religious and legal: *Russell Sandberg*, Law and Religion (Cambridge 2011), chapter 9; *Russell Sandberg*, The Reformation of Religious Law, special Quaderni di Dritto e Politica Ecclesiastica (2017), 97.

47 *Niklas Luhmann*, Law as a Social System (Oxford 1993 / 2004), 467.

48 Ibid.; *Niklas Luhmann*, A Systems Theory of Religion (Stanford 2000 / 2013), 165.

Understanding religious legal systems as social systems in their own right would rebut perceptions that regard them as a throw-back to pre-modern undifferentiated society. Rather than being signs of de-differentiation, religious legal systems should be seen as evidence of "re-differentiation." This would represent a further stage of functional differentiation where the voluntary organizations (religious and non-religious) perform functions which it was thought had become the preserve of the state. This approach would question Luhmann's implicitly forward-moving model of history by showing how further differentiation can occur in a less centralized way. In an undifferentiated society, religions routinely dealt with all matters of adherents' life, including any adjudicative functions. In a differentiated society, adjudication passes to the legal system and to the state. In a re-differentiated society, the legal system/state abrogates responsibility for adjudication on certain matters and so those matters fall back to the religious systems, which in turn develop ways to charge these functions in a way that blends religious and legal discourses and behaviors. This insight transforms the way in which religious legal systems are regarded and places them firmly in the context of the privatization of disputes, especially in the context of family law.[49] This shifts the debate from whether religious legal systems should exist to how and when the state should ensure that standards are met, regarding religious courts and tribunals like any other form of alternative dispute resolution.

III. CONCLUSIONS

A sociological perspective is one way of taking a critical approach to law. As Roger Cotterrell put it, "a critique of law must put all taken-for-granted assumptions about the nature of law in issue."[50] This article has shown how a sociological approach can provide a critical lens by which to analyze religious law. Following but furthering Norman Doe, it examined how reference to the internal rules of religion can help verify, reject, or nuance sociological theories and propositions regarding, for instance, internal secularization. It demonstrated the missing legal elements of the five phases identified by sociologists, while reference to the empirical research on religious courts showed how reference to religious law in practice complicates but enriches our understanding of the sociological place of religion.

The remainder of this chapter then underlined how there is no such thing as a singular sociological approach and explored one particular sociological theory as a case study of how this can enrich our understanding of the internal laws of religion. It contended that Luhmann's social systems theory can transform how we look at religious law. The inability of the legal system to regard religious laws as law and the pervasiveness of functional differentiation has led to religious legal systems being regarded as at best archaic throwbacks and at worst destabilizing manifestations of de-differentiation. A systems theory approach provides the explanation for why legal actors originally ignored religious law and why they then fixated on its recognition and enforcement by the state. It shows those within the social system of law cannot see religious law as law and have normalized functional differentiation to the degree that it can only see religious arbitration as a throwback or a threat. Moreover, crucially, systems theory can be developed to provide the answer: a means by which religious law can be regarded as law and by which religious legal systems can be seen as social systems in their own right. Social systems theory endorses but also transforms understandings of legal pluralism, by crucially providing a dynamic means by which law can be distinguished from other forms of social control. A focus on discourse changes the debate from being concerned about *whether* religious law is law to focusing on *when* religious law is law (or to be more precise, when religious communications are legal ones). This allows religious institutions that produce legal communications through legislation or adjudication to be seen as social systems in their own right.

This is not to say that Luhmann's social systems theory or functionalist approaches in general provide the only or best sociological means of critique. There is a need to consider, apply, and analyze other sociological theories and perspectives, too. Indeed, sociology does not have a monopoly in terms of providing a critique of law. As I have argued more generally elsewhere, a historical approach to law can also provide a necessary subversive critique.[51] Moreover, a truly interdisciplinary approach to law means that we should not be fixated or limited by disciplinary boundaries. There are wider perspectives that could be applied to further our understanding of religious law.[52] Approaches such as feminist theory are undoubtedly valuable in highlighting questions of gender and power that

49 For further discussion, see *Russell Sandberg/Sharon Thompson*, The Sharia Debate: The Missing Family Law Context, Law & Justice 177 (2016), 188.

50 Roger Cotterrell, Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship, Journal of Law and Society 14 (1) (1987), 77, 79.

51 *Russell Sandberg*, Subversive Legal History: A Manifesto for the Future of Legal Education (London 2021).

52 Linguistic studies including insights from etymology are also of value. For an excellent example of socio-legal work which analyses the origins and changing meaning of the "gold-digger" expression, using this to critique the law and argue for reform see *Sharon Thompson*, In Defence of the "Gold-Digger," Oñati Socio Legal Series 6 (6) (2016), 1225.

are often overlooked.[53] Given that Feminist Legal Studies and Critical Race theorists have provided important and groundbreaking re-appraisals of secular law by placing gender and race to the fore, it is surely time for the same to happen in relation to religious law. Indeed, it may be questioned what would happen more generally if religion was placed to the fore as a means of subverting law.

53 See *Sharon Thompson/Russell Sandberg*, Multicultural Jurisdictions: The Need for a Feminist Approach to Law and Religion, in: Sandberg (ed.), Leading Works in Law and Religion (London 2019), 179.

