A Systems Theory Re-Construction of Law and Religion

Russell Sandberg[*]

Abstract: Law and Religion has rapidly developed as an academic sub-discipline in English and Welsh Law Schools in the twenty-first century amidst a significant amount of legislation, litigation and public debate about religion. However, there are signs that this sub-discipline is becoming inward looking and stagnating. This article takes a step back and uses Niklas Luhmann's social systems theory to explore how Law and Religion has developed as a sub-discipline. Bringing together Luhmann's work on law and his work on religion, a systems theory of Law and Religion is developed for the first time. Deriving from but refining and developing social systems theory, the article argues that Law and Religion requires a radical rethink if it is to flourish as an area of study.

Key words: Luhmann, systems theory, autopoiesis, social systems, law and religion, scholarship

1. Introduction

In the twenty-first century Law and Religion came to exist as a new academic sub-discipline in English and Welsh Law Schools. Although there were some notable works on Law and Religion published in the late twentieth century,[1] it was only in the twenty-first century that

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[*] Professor of Law at Cardiff University. I am grateful to Dr Sharon Thompson for her useful comments on an earlier version of this chapter.

[1] In 1987, the Ecclesiastical Law Society was formed 'to promote the study of ecclesiastical and canon law particularly in the Church of England and those churches in communion with it'; while in 1991, the LLM in Canon Law degree was launched at Cardiff University, the first degree to study the laws of the Church of England and Catholic Canon Law since the Reformation. Throughout the 1990s the focus of both institutions broadened. The Ecclesiastical Law Society's journal, the *Ecclesiastical Law Journal*, published articles on the laws of other religions and faith communities and on national and international laws affecting religion while the success of the LLM programme led Cardiff University to establish its Centre for Law and Religion in 1998. See

the literature blossomed.[2] An academic industry devoted to Law and Religion came into existence.[3] There were now specialist journals, book series, research clusters and conferences as well as academics that identified their research interest primarily as being Law and Religion. Indeed, there has even been a book published reflecting on the state of the discipline.[4] This academic interest accompanied significant legal change. The early years of the twenty-first century saw a number of new laws and cases about the place of religion in the public sphere. A new legal framework concerning religion came into operation as religion became protected as a human right, discrimination on grounds of religion became unlawful and the offence of blasphemy was replaced with offences of stirring up religious hatred.[5] Litigation concerned such topics as religious dress and symbols, and the clash of rights between religious freedom on the one hand and freedom of expression or homosexual rights on the other.[6] And a speech by the then Archbishop of Canterbury, Dr Rowan Williams, lit the fuse for a moral panic about the operation of religious tribunals.[7] The new legal framework created the opportunity and need for scholarship and a body of Law and Religion scholarship quickly developed to fulfil this need.

However, Law and Religion remains underdeveloped as an academic sub-discipline. Although there has been a significant growth in the number of bespoke journals, conferences and book series, Law and Religion lacks other characteristics that legal sub-disciplines often possess. It is not an established part of general Law conferences, few publishers include it as

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N Doe, 'The First Ten Years of the Centre for Law and Religion, Cardiff University' (2008) 10 (2) *Ecclesiastical Law Journal* 222.

[2] A bibliography compiled for the Ecclesiastical Law Society's silver jubilee indicated that whilst between 1987 and 1997 there were on average 2 to 3 books published per year, this figure grew to an average of 6 books between 1997 and 2000 and to 10 books after 2007. This rise was even more accelerated in the case of edited books. See R Sandberg, 'Silver Jubilee Bibliography: Ecclesiastical Law Publications 1987-2011' (2012) 14 *Ecclesiastical Law Journal* 149.

[3] The language of 'industry' is derived from R Grillo,*Muslim Families, Politics and the Law* (Ashgate, 2015).

[4] R Sandberg (ed), *Leading Works in Law and Religion* (Routledge, 2019).

[5] R Sandberg, *Law and Religion* (Cambridge University Press, 2011)

[6] See especially the cases of *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 and *Eweida and others v United Kingdom* [2013] 57 ECHR 8.

[7] R Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262.

a category study and it is seldom taught. There has not been a significant increase in the amount of specialist modules or textbooks.[8] It is also noticeable that legal textbooks on areas such as Public Law, Family Law and Employment Law continue to rarely mention religion. Law and Religion scholarship has tended to be published in specialist journals or edited collections. Articles on religion in the general legal journals remain exceptional and are less common than they were a few years ago. Significant social and legal changes meant perhaps that Law and Religion developed too quickly as a sub-discipline. The near absence of textbooks and taught undergraduate modules meant that questions about the scope and nature of the field were rarely articulated. It has developed as a niche specialism.

Law and Religion has become a ghettoised academic community and is attracting less interest than it did at its peak a decade ago. Law and Religion is not a major feature of Law Schools and neither is such work characterised by collaboration with other parts of the academy. John Witte Jr has described how 'a new interdisciplinary movement has emerged in the United States dedicated to the study of the religious dimensions of law, the legal dimensions of religion and the interaction of legal and religious ideas and institutions, norms and practices'.[9] This side of the pond, by contrast, the study of Law and Religion has not developed into an interdisciplinary endeavour. [10] Law and Religion has developed as a legal sub-discipline focusing very much on understanding religion legally rather than understanding law religiously.[11] Multidisciplinary and interdisciplinary work on Law and

[8] See further R Sandberg, 'Prologue' in R Sandberg (ed) *Leading Works in Law and Religion* (Routledge, 2019) 1; R Sandberg 'Snakepits & Sandpits' in R Sandberg, N Doe, B Kane and C Roberts (eds) *Handbook of the Interdisciplinary Study of Law and Religion* (Edward Elgar, 2019) 2.
[9] J Witte, Jr., 'The Study of Law and Religion in the United States: An Interim Report' 14 (2012) *Ecclesiastical Law Journal* 327.
[10] For a discussion of a range of perspectives that could be applied in relation to Law and Religion see the essays in R Sandberg, N Doe, B Kane and C Roberts (eds) *Handbook of the Interdisciplinary Study of Law and Religion* (Edward Elgar, 2019).
[11] There are a number of constitutional theorists who do work from this perspective, most notably Carl Schmitt and the vast literature spawned by his 'Political Theology' and other works.

Religion remains the exception rather than the norm.[12] Ironically, the structures set up in order to help grow the sub-discipline such as specialist journals and associations have ended up constraining it. There is a real risk that Law and Religion scholars will speak only to one another and will be immune from and unable to shape wider debates

The methodologies of most Law and Religion scholarship reflect the methodologies dominant in Anglo-Welsh Law Schools. Doctrinal study is commonplace but the law is understood within a socio-legal paradigm. This invariably reflects Westernised expectations about the place of religion, regarding religion as a form of personal identity that belongs for the most part at least in the private sphere. Suhraiya Jivraj has criticised what she refers to as 'socio-legal law-and-religion scholarship' for 'conceptualizing religion in predominately theological terms such as belief / faith and practice' which 'tends to marginalize [the] racialization of non-Christianness' and understands religion 'as a contingent concept that can come to be produced within law'.[13] Jivraj argues that this is equally true of Law and Religion scholarship that accepts 'more complex notions of religious identity' in that these works perpetuate 'an onto-theological model of belief and ritual practice' that is 'so often left un-interrogated'.[14] She points out that Law and Religion scholarship 'seeks to increase protection specifically of minority religions within European nations as well as religious autonomy within Western liberal democracies through the frameworks of legal pluralism and / or multiculturalism'.[15] The extent to which liberalism underpins Law and Religion scholarship (invariably unwittingly) is underlined by Sylvie Bacquet's work which refers to 'the liberal law of religion'.[16] Bacquet distinguishes between four different rationales for

[12] R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014).
[13] S Jivraj, *The Religion of Law: Race, Citizenship and Children's Belonging* (Palgrave, 2013) 82.
[14] Ibid 28.
[15] Ibid 5. For further discussion of the prevalence of the concept of autonomy see R Sandberg and S Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 237
[16] S Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge, 2019) 141. There is a vast literature on the connection between liberalism and the law's attitude towards religion see, most notably, R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (2nd edition, Oxford University Press, 2015).

religious freedom: the ' Religious Argument that 'religion is superior to other forms of belief' since 'individuals are duty bound to a transcendental being'; the Historical Argument 'sees religion not as superior but as a vulnerable concept in need of special legal protection'; the Autonomy Argument 'having liberty to choose one's religion is an essential part of autonomy; and the Human Rights Argument that 'the struggle for religious liberty is what gave the impetus for the struggle for human rights which led to the human rights machinery'.[17] It is clear, however, that Anglo-Welsh Law and Religion scholarship for the most part is predicated upon these last two rationales. Like all disciplines and sub-disciplines, Law and Religion is authored; it is constructed; it is full of values. The emphasis based upon autonomy and human rights comes from a place which values individualism, which assumes that everyone has equal access to an equal playing field. And this often unseen starting point has coloured the questions that Law and Religion scholars ask and the answers they propose. Given these concerns and that sometime has passed since the new legal framework on religion has come into existence, it is timely and appropriate to take a step back to evaluate the current state of Law and Religion scholarship. This article does this by using and developing Niklas Luhmann's social systems theory. 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. This article explores and applies systems theory to the interaction of Law and Religion.[18] Applying a systems theory lens, it explores how Law and Religion has developed, both in terms of legal development and academic scholarship. The article falls

[17] S Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge, 2019) 137-138.

[18] An essay by Michael King which briefly raises the prospect of a systems approach in the context of law and religion is the sole exception to date: M King, 'The Muslim Identity in a Secular World' in M King (ed) *God's Law Versus State Law* (Great Seal, 1995) 91. There are a few works which explore Luhmann's systems theory in relation to legal pluralism but these are not situated in the Law and Religion context as pointed out in R Sandberg, 'Religious Law as a Social System' in R Sandberg, (ed) *Religion and Legal Pluralism* (Ashgate, 2015) 249 and R Sandberg, 'The Lure of Luhmann: A Systems Theory of Law and Religion' in R Sandberg, N Doe, B Kane and C Roberts, Handbook *of the Interdisciplinary Study of Law and Religion* (Edward Elgar, 2019) 221.

into three sections. The first section provides a brief sketch of Luhmann's social systems theory. The second and third sections explore how Luhmann's work would help to understand and overcome pressure points currently found within Law and Religion in England and Wales. The second section focuses on what has been called 'religion law', this is the 'external' national and international laws affecting religious individuals and groups. [19] The third section focuses on 'religious law', the internal laws or other regulatory instruments created by religious collectives themselves. Both sections propose new ways of seeing religious law and religion law respectively which draw upon the work of Luhmann and theorists he has inspired but which develop new theories and concepts.[20] The section on religion law proposes that the way in which law represents religion has changed from what I call 'Liberal Tolerated Agnosticism' to 'Neo-Liberal Multicultural Juridification',[21] a representation which is now itself being challenged. The section on religious law proposes that religious legal systems be defined and understood as social systems in their own right. The purpose of this article is to demonstrate how systems theory can be developed to provide an explanation of how the interaction between Law and Religion has developed and how it point to a need to revitalise what has become a stagnant sub-discipline.

2. Systems Theory

A. The Reputation of Niklas Luhmann

[19] This distinction is made to stress their interdependence and the need for both to be studied: N Doe and R Sandberg, 'Introduction' in N Doe and R Sandberg (eds) *Law and Religion: New Horizons* (Peeters, 2010) 9, 11. However, it is fully articulated in R Sandberg, R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapters 1 and 9. It has been revisited in N Doe and R Sandberg, 'Religion Law and Religious Law' in N Doe and R Sandberg (eds), *Law and Religion – Critical Concepts in Law* (Routledge, 2017) 1

[20] Some of what a systems theory lens focuses on has, of course, been highlighted previously by commentators. A systems theory approach, however, provides a means of exploring, de-constructing and re-constructing the subject matter of Law and Religion as a whole. It provides a new way of seeing the overall picture.

[21] The concept of juridificiation comes from Habermas and develops an argument found in R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 10 and R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) chapter 1.

Few sociologists have written about both law and religion. The founding fathers of sociology did so. Karl Marx, Emile Durkheim and Max Weber were all concerned in different ways by the changes that were occurring following the Enlightenment, with the rise of modern society.[22] They all recognised post-enlightenment secularisation: the social decline of religion and the rise of law. Their works have held great sway in sociology generally and the sociology of religion and the sociology of law in particular. Niklas Luhmann provides a rare example of a late twentieth century sociologist whose work also focused on both law and religion. Like the founding fathers, Luhmann's interest in these areas formed part of a general social theory. However, to date, Luhmann's sociological theories pertaining to law and religion have been understood separately. This may result from the way in which Luhmann is a controversial yet marginal figure. Shortly before his death in 1998, Luhmann referred to himself as 'the devil'.[23] It is easy to see the appropriateness of this self-designation. Although his work has attracted a significant degree of scholarly attention, Luhmann remains a controversial figure in his own native Germany and much further afield. This has meant that the mere mention of his name or reference to his social systems theory can provoke negative and hostile reactions.[24] His theory is often dismissed as being an overly complex meta-theory that allows no room for alternative explanations. However, such denouncements are often based upon somewhat caricatured versions of his theory .Luhmann did not see his work as providing 'the last word or ... an exclusive or true account of what society, in its totality, is and how it operates'; rather he sought to offer 'a social theory of social theories – a social theory which considered multiple ways of perceiving and understanding society'.[25] The

[22] See further R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) 13-14, 239-240.
[23] M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave, 2003) 203.
[24] See King and Thornhill (ibid 204) for a discussion and refutation of 'eight common critiques' of Luhmann's work.
[25] Ibid 1.

significant delay in translating many of his works into English and French,[26] the number of different interpretations that have evolved in the now vast secondary literature[27] and the dynamic nature of his work which underwent a self-professed 'paradigm change',[28] all provide some mitigation.

However, it would be naive to assume that Luhmann's controversial reputation results merely from 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' general systems theory –[29] and then developed it a way that represented a significant break with (and therefore challenge to) long-standing sociological orthodoxies. Luhmann regarded modern sociology as being 'in a profound theoretical crisis',[30] failing to produce 'anything approaching an adequate theory of society'.[31] To remedy this, his work rebooted sociological theory correcting what he considered to be a wrong turn made at the time of the

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[26] On which see M Albrow, 'Editor's Introduction' in N Luhmann,. *A Sociological Theory of Law* (2ndedn, Routledge, 1983/ 2014) xxxii and R Nobles and D Schiff, 'Introduction' in Luhmann, *Law as a Social System* (Oxford University Press, 2004) 3.

[27] J Priban, '(Review of) *Niklas Luhmann: Law, Justice, Society* by Andreas Philippopoulos-Mihalopoulos' (2010) 73 *Modern Law Review* 893. In relation to law, there is a need to distinguish between Luhmann's work and the work of Gunther Teubner which although very much builds upon Luhmann, also adapts the theory considerably been particularly influenced by Habermas' ethical / justice based critique of communication and dominance.

[28] N Luhmann, *Social Systems* (Stanford University Press, 1984/1995) 1. In terms of his legal writings there is a clear shift between the first edition of *A Sociological Theory of Law* (Routledge, 1972 /1985) and *Law as a Social System* (Oxford University Press, 1993 / 2004). The development of his thought was shown by the new conclusion he added to the second edition of *A Sociological Theory of Law* (Routledge. 1983/ 2014). In terms of religion, this shift can be found after the publication of *Funktion der Religion* (*Funktion der Suhrkampf*, 1977), culminating in his posthumous publication *A Systems Theory of Religion* (Stanford University Press, 2000 / 2013). In all citations of Luhmann's work, the first date refers to the date of the original German publication while the second refers to the English publication date. For the purpose of this article, no distinction will be made between Luhmann's earlier and later work. The article will analyse his work as a whole assuming that the later replaces the earlier when there is divulgence.

[29]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: R Laermans and G Verschraegen, '"The Late Niklas Luhmann" on Religion' (2001) 48(1) *Social Compass* 7, 9. Parsons work has also been afforded little attention in the sociology of law: R Banaker, and M Travers, R. 'Systems Theory' in R Banaker and M Travers (eds), *Law and Social Theory* (2nd edn, Hart. 2013) 53. See, however, K C Bausch, *The Emerging Consensus in Social Systems Theory* (Springer, 2001) for a full discussion of the field of systems theory.

[30] N Luhmann, *Introduction to Systems Theor*y (Polity, 2002 / 2013) 1.

[31] N Luhmann, *Theory of Society*. Volume 1 (Stanford University Press, 1997 /2012) 2.

Enlightenment.[32] 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'.[33] 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'.[34] Rather, the social change that resulted from the Enlightenment – the rise of Reason and the rationalisation of society – was not the result of the actions of people but of systems. Luhmann insisted that systems rather than people are 'the genuine "medium of Enlightenment"; it was (and is) 'systems themselves, not integral people, which actually stimulate and perpetuate the processes of societal rationalization.'[35] As Moeller points out, Luhmann's basic claim that 'society does not consist of human beings can be seen as shocking, as going against common sense, or as absurd'.[36] Many critics of Luhmann would accuse it of being all three.[37]

However, such criticisms are overstated.[38] Luhmann's theory is not anti-human; it is no more so than the grand theories of Marx or Durkheim. The thing to remember is that, like those theories, it is a social theory: a theory of society rather than psychological-organic systems.[39] For Luhmann, people are '"living systems", which exist as bodies and bodily

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[32] As King and Thornhill note, Luhmann positioned his theory 'as an attempt to undermine and critically to refigure the central principles of political and legal reflection deriving from the European Enlightenment': M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave, 2003) 129.
[33] Ibid 132.
[34] 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'.
[35] This distinguishes Luhmann's work from Parsons who could be summarised as being based on the proposition that: 'Action is system' (N Luhmann, *Introduction to Systems Theor*y (Polity, 2002 / 2013) 7). By contrast, for Luhmann, 'the autonomy which characterizes modern society is, in fact, not the autonomy of human beings at all, but the autonomy of systems themselves': M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave, 2003) 141)
[36]H Moeller, *Luhmann Explained* (Open Court, 2006) ix.
[37] For discussion see, e.g. R Cotterrell, 'The Representation of Law's Autonomy in Autopoiesis Theory' in J Priban and D Nelken, (eds) 2001. *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Ashgate. 2001) 80, 95-98.
[38] M King, 'The Radical Sociology of Niklas Luhmann' in R Banaker and M Travers (eds)*, Law and Social Theory* (2nd edn, Oxford: Hart, 2013) 59, 62.
[39] N Luhmann,. *A Sociological Theory of Law* (2nd edn, Routledge, 1983/ 2014)

parts, and "psychic systems", which produce meaning through consciousness'. These can be contrasted with society which 'consists of interdependent social systems which make sense of their environments through their communications'.[40] A system and how it develops can be analysed while simultaneously recognising that the system is a human construct and that it is being constantly shaped by the actions of individuals. It is perfectly possible to talk and analyse the legal system or systems within the legal system while recognising that the system is the product of humans thinking and litigating. As Nobles and Schiff noted, a systems theory analysis simply takes a different focus: 'its hermeneutics are rooted not in the intentions of human actors, but in the meanings generated by those actors through their participation as communicators'.[41]

B. The Theory in Outline

Luhmann's systems theory rejected the 'anthropocentric' assumptions found in almost all sociological studies by focusing upon social systems as the primary unit of analysis and insisting that these systems consist of communications, not of people.[42] Systems theory rests upon the notion of functional differentiation; the way in which in modern society a plethora of social systems discharge specific functions as opposed to the pre-modern tendency for one specific institution to discharge a plethora of functions. For Luhmann, modern society is functionally differentiated into autonomous social systems such as law, religion, politics, science and the media.[43] Luhmann saw these social systems as reproducing themselves by

[40] M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave, 2003)7.
[41] R Nobles and D Schiff, 'Using Systems Theory to Understand Legal Pluralism: What Could be Gained?' 46(2) (2012) *Law and Society Review* 265, 266-267.
[42] M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave, 2003) 2.
[43] This concept of differentiation is much discussed in sociological theories of secularisation: see R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) 64.

communication, rather than following Durkheim and Weber in seeing them as being the product of labour divisions or social action.[44]

For Luhmann, social systems are self-referential: he came to refer to them as 'autopoietic' systems on the grounds that they produce and reproduce their own unity.[45] The unity and autonomy of social systems is also achieved through Luhmann's concept of 'closure'. For Luhmann, all social systems are 'operationally closed, but cognitively open'.[46] Social systems are operationally closed because they are self-referential; their individual operations 'are identified as such by themselves'.[47] However, they are 'cognitively open' in that they require 'the exchange of information between system and environment'.[48] Systems confront events and communications from outside which are then 'transformed or re-constructed' by the particular social system.[49] Closure is therefore linked to the concept of 'structural coupling', Luhmann's description given to the links that develop between social systems.[50] This concept is used to describe how social systems co-evolve so that one includes each other in its environment.[51] For Luhmann, 'structural coupling is a mechanism that both separates and joins'.[52] By evolving links with one another, systems can be both autonomous and coordinated.[53]

Social systems define themselves based on self-description: as systems reproduce themselves, they also define themselves by distinguishing themselves from other social systems. Law is one social system and, like other social systems, law reproduces itself by

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[44] M King, and C Thornhill,. *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, 2003) 11.
[45] N Luhmann. *A Sociological Theory of Law* (2nd edn, Routledge. 1983/ 2014) 281.
[46] R Nobles and D Schiff, 'Introduction' in N Luhmann, *Law as a Social System* (Oxford University Press, 2004) 1, 8.
[47] N Luhmann, *Law as a Social System.* (Oxford University Press, 1993 / 2004) 86.
[48] N Luhmann, *Essays on Self-Reference* (Columbia University Press, 1990) 229.
[49] M King, 'The "Truth" about Autopoiesis' (1993) 20 *Journal of Law and Society* 218.
[50] N Luhmann, *Law as a Social System.* (Oxford University Press, 1993 / 2004) 385.
[51] M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave, 2003) 33. For Luhmann, each social system produces its own environment. The central form of relationship in the social world is 'not that between individual and society, but that between a social system and its environment': ibid 3-4).
[52] N Luhmann, *Law as a Social System.* (Oxford University Press, 1993 / 2004) 400.
[53] R Nobles and D Schiff, 'Using Systems Theory to Understand Legal Pluralism: What Could be Gained?' 46(2) (2012) *Law and Society Review* 265, 281.

communication. It is 'neither structure nor function' that defines what law is.[54] For Luhmann, neither 'law' nor 'the legal system' are defined by institutions, the status of individuals or 'organised legal practice'.[55] The legal system defines and distinguishes itself. This shifts the focus from debates on the 'true nature of law' towards asking how law defines its own boundaries and where they are drawn.[56] It also means that other systems accept law's decisions as 'social facts'.[57] Functional specification means that each social system focuses upon 'a specific problem of society'.[58] Each social system has its own functional specification and its own binary code which produces and reproduces the system, keeping it distinct from all other social systems. The unique function and code provide the means by which each system will self-define and therefore perpetuate themselves. In addition, social systems develop programmes to stabilise the application of their codes. Programming has the effect of concealing the fundamental arbitrariness and contingency of the application of the code.

Turning to the social system of law, law's function is the 'stabilization of normative expectations' in the face of disappointment.[59] Law's binary code is legal / illegal.[60] As Teubner notes, this means that 'law' includes any phenomenon which is communicated using the distinction legal/illegal that has the function of the stabilization of normative expectations.[61] Any communication that has this function and uses the legal / illegal code becomes part of the social system of law. Any social system that distinguishes itself in the same manner as law is regarded as law. This would include any system that produces legal

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[54] G Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in G Teubner (ed) *Global Law without a State* (Ashgate, 1997) 3, 14-15.
[55] M King, and C Thornhill, *Niklas Luhmann's Theory of Politics and Law.* (Palgrave Macmillan, 2003) 35.
[56]Ibid 42.
[57]Ibid 38.
[58] N Luhmann, *Law as a Social System.* (Oxford University Press, 1993 / 2004) 93.
[59] Ibid 147-148.
[60]Ibid 98 -99.
[61]G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) 13 *Cardozo Law Review* 1443, 1451.

communications (that is, communications that uses the legal / illegal code and fulfil the function of law). In the social system of law, programming takes the form of legislative provisions and common law principles 'which make application of the code depend on specific criteria, as opposed to the bare will of the immediate decision-maker'.[62] The academic rationalisation of programmes into doctrines and accounts provides further stability.

The binary code enables the system to 'conceal the paradox of its own existence': for a social system to operate it cannot doubt its own validity.[63] Luhmann notes that 'codes are a precise copy of the paradox that they serve to resolve'.[64] For example, law cannot doubt the validity of its claim that its decisions are legal.[65] This is protected the binary code of legal / illegal which requires law to decide between legality and illegality without ever questioning its validity for doing so. The paradox at the heart of each social system cannot be overcome but can be 'managed' by what John Harrington has called 'deparadoxifcation strategies'.[66] Law is presented as concrete and certain when in reality every legal decision could actually have 'gone the other way'.[67] Paradoxically, 'law is binding, but provisional; normative, but arbitrary'. Paradox is the 'persuasive and definitive feature of law'. The role of legal actors (including legal academics) is to explain away this paradox. As Harrington notes, 'every move to deparadoxify legal operations is itself an exercise in contingent persuasion'. The contingency of law is concealed by legal actors. The conventional and dominant accounts given of legal change and of formation are smokescreens. As Harrington has argued in

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[62] J Harrington, 'Of Paradox and Plausibility: The Dynamic of Change in Medical Law' (2014) 22(3) *Medical Law Review* 305, 311. See also the essays in O Perez and G Teubner (eds), *Paradoxes and Inconsistencies in Law* (Hart, 2006).
[63] M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, 2003) 21.
[64] N Luhmann, *A Systems Theory of Religion* (Stanford University Press, 2000 / 2013) 48.
[65] M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, 2003) 21.
[66] J Harrington, 'Of Paradox and Plausibility: The Dynamic of Change in Medical Law' (2014) 22(3) *Medical Law Review* 305, 306. See also J Harrington, *Towards a Rhetoric of Medical Law* (Routledge, 2017) chapter 2.
[67] J Harrington, 'Of Paradox and Plausibility: The Dynamic of Change in Medical Law' (2014) 22(3) *Medical Law Review* 305, 312.

relation to medical law, 'academics and other commentators involve themselves in medical law not as detached experts, but rather as participants in ongoing struggles over how to manage legal paradoxes'.[68] Like judicial decisions, academic narratives restore 'a measure of provisional stability'.[69] As Harrington argued, 'the achievement of the legislator, common law systematiser, and doctrinal scholar is always (only) one of plausibility'; providing 'plausibilities' which explains developments within the context of the conventional narratives. Exploring how these 'plausibilities' decline and are replaced over time gives us, argues Harrington, a neat means of mapping and analysing socio-legal change.

3. Religion Law

Having sketched Luhmann's theory, the question arises of how a social systems theory of Law and Religion challenges and changes conventional understandings of the field as a whole and issues that have arisen within it. Turning first to religion law, the major trend has been that the role of religion in the public sphere has become increasingly controversial. In part, this has been a response to terrorism in the name of religion and related growing ill-ease concerning the integration of multicultural, multiethnic and multilingual communities which has meant that those who owe allegiance to a power above and beyond the State are treated with suspicion. However, religious violence is by no means new and so the moral panics about religious rights cannot be traced solely to back to this. Rather, and this is where systems theory becomes useful, the moral panics about religious rights and religious authority can be explained as offending expectations about functional differentiation.

Many of the pressure points found in the modern interaction between Law and Religion are in many ways a consequence of expectations about the different and discreet

[68] Ibid 306.
[69] Ibid 310.

functions of law and religion as two separate social systems. This underpins, for instance, the controversy surrounding whether and when State courts should decide upon religious matters,[70] the continued constitutional and legal links between the State and the Church of England as a Church 'established by law',[71]and the existence of so-called 'faith schools'.[72] The place of religion in the public sphere in all of these controversies is inherently problematic because it offends the expectation of functional differentiation: the notion that religion should perform only religious functions.

These debates reflect a fears what Luhmann calls 'de-differentiation', the dissolution of processes of differentiation, which he saw as 'the greatest threat to modern society'.[73] This fear of de-differentiation exists because the 'return' of religion to the public sphere offends the deparadoxifcation strategies constructed by law to make sense of its interaction with religion. In Harrington's terms, it offends the plausibility offered by the legal system which rests upon functional differentiation.[74] Harrington's work in relation to medical law shows how by focusing on changing patterns of plausibility, it is possible to map changes in how law represents its environment including other social systems. This can be applied and developed in relation to religion. It is possible to identify a move from one deparadoxifcation strategy to another; from a legal representation of religion which can be called 'Liberal Tolerated Agnosticism' to one which may be dubbed 'Neo-Liberal Multicultural Juridification'.[75] This led to, perpetuated and was then itself perpetuated by the developing field of Law and Religion. However, Neo-Liberal Multicultural Juridification has itself has

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[70]See, e.g., *Shergill v Kharia*[2014] UKSC 33, discussed by R Sandberg and S Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137, 152-153..
[71] R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 4.
[72] See ibid chapter 8.
[73] M King, and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, 2003) 225.
[74]J Harrington, 'Of Paradox and Plausibility: The Dynamic of Change in Medical Law' (2014) 22(3) *Medical Law Review* 305, 312.
[75] The labels are derived from and develops theories found outside systems theory. This develops what has been identified as the 'two waves of secularisation': 'Liberal Tolerated Secularism' was the product of the first wave of secularisation while 'Neo-Liberal Multicultural Juridification' is the manifestation of the second wave: R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) 171.

now become questioned and this is what Law and Religion is struggling to come to terms with. The following will explore this in greater depth and will fall into three parts: a discussion of Liberal Tolerated Agnosticism; the rise and main features of Neo-Liberal Multicultural Juridification which replaced it; and the main challenges that Neo-Liberal Multicultural Juridification now faces.

A. Liberal Tolerated Agnosticism

It is possible but a simplification to identify different periods in which law has recognised, regulated and represented religion differently.[76] The English Reformation resulted in the nationalisation and centralisation of religion: being an adherent of the Church of England was synonymous with being a subject of the Crown. Being of a different faith and acting upon it was not only heresy but treason. And the Church, as it had been in the pre-Reformation period, was at the centre of social life both nationally and locally. In the centuries that followed the English Reformation this gradually changed by means of an ad hoc process of toleration whereby the numerous legal disabilities on other faiths and creeds were lifted one by one. Moreover, the age of enlightenment, the growth of other social institutions and the rise of the centralised State reduced the role of the Church. By the late nineteenth century, functional differentiation had left religion as one social institution amongst many. As Julian Rivers has observed, by the late nineteenth century 'a constitutional settlement had been reached in the relationship between religion and the state' and 'by the 1920s this settlement was no longer even socially or politically controversial'.[77]

[76] See J Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) chapter 1 and R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 2.
[77] J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 373.

Luhmann's work regards secularisation as a form of self-description on the part of religion as part of the system's attempt to understand the effect of functional differentiation.[78] This can be expanded. What I have previously referred to as the first wave of secularisation had occurred.[79] The first wave of secularisation can surely be understood as self-description on the part of religion to understand functional differentiation.[80] The effect of the first wave of secularisation was to force religions to consider their new role as one social system amongst others and their new place as 'a partial domain of culture'.[81] This resulted in 'internal secularisation',[82]where 'religious organizations choose to apply the codes of other social systems to themselves and their operations' and 'as a price for influence over society and over systems, [religious organisations have] progressively been obliged to couch its message in terms of a general morality.'[83] Liberal Tolerated Agnosticism justified a particular relationship between religion and the law.[84] As Hoffmann J commented in 1993, 'the attitude of the English legislator to racing is much more akin to his attitude to religion…it is something to be encouraged but not the business of government'.[85] Religion was regarded by law as a benign force for good which was also increasingly part of a private sphere which would seldom bother law. This was perhaps most clearly reflected in English charity law. As Quint and Hodkin point out, the 'growing tolerance and diversity in the

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[78]Luhmann is often primarily regarded as a theorist of secularisation within the sociology of religion: R L GertVerschraegen, '"The Late Niklas Luhmann" on Religion' (2001) 48(1) *Social Compass* 7, 8-9

[36]For discussion of functional differentiation within the secularisation thesis see R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) 64 *et seq*.

[79] See further R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 2.

[80]The first wave refers to the (on-going) battles of modernity which began with the Enlightenment, and which affected mainly the societal level, moving the Church away from the centre of social life. This included processes of differentiation, societalisation, rationalisation, individualism and compartmentalisation. See ibid chapter 2.

[81] For Luhmann, 'a new concept of "culture" emerged in the second half of the eighteenth century: N Luhmann, *A Systems Theory of Religion* (Stanford University Press, 2000 / 2013) 224- 225.

[82] See, further, R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 3. .

[83]M King, The Muslim Identity in a Secular World' in M King (ed) *God's Law Versus State Law* (Great Seal, 1995) 91, 97, 105.

[84] It is worth noting, however, that the law did not become entirely secularised or even-handed. The Church of England remained in a special legal status but its centrality to public life dwindled as it was no longer the automatic vehicle for local government, education and welfare.

[85]*R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1WLR 909 at 932.

treatment of religions in charity law' rendered questionable the 'original rationale' of recognising religious trusts which 'was to assist the established (State sponsored) religion, whilst preventing support for heresy and false religions'.[86] They point out that this had been replaced by a 'modern rationale' which recognised the psychological and social worth of individual religiosity.[87] This change in underlying principle was underlined in *Gilmour v Coats*[88]:

> 'The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true'.

The way that the law represented religion was plausible at the time given the growing centralisation, welfarism and paternalism.[89] It was also plausible because for the most part the accommodation of religion was straightforward. Christianity was prevalent and were intertwined with the 'traditional British values' expressed by the various social systems.

The plausibility that cemented Liberal Tolerated Agnosticism was challenged in the late twentieth century by what I have previously referred to as a 'second wave' of

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[86]F Quint and P Hodkin , 'The Development of Tolerance and Diversity in the Treatment of Religion in Charity Law' (2007) 10(2) *Charity Law and Practice Review* 1, 1-3.
[87] See also *Holmes v HM Attorney General* (1981) The Times, 12 February.
[88][1949] AC 426.
[89] As Rivers noted, 'nineteenth-century separation mentality between Church and state did not result in a narrow private conception of spirituality as opposed to a broad notion of state welfare, precisely because social welfare was so obviously a religious function. But as the welfare state grew through the twentieth century, the separation mentality survived, in a model of co-ordination': J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 395.

secularisation.[90] As Charles Taylor has pointed out, the sixties provided 'the hinge moment, at least symbolically,' ushering in 'an individuating revolution'.[91] This period witnessed the decline of certainty regarding gender roles, class distinctions and Britain's place in the world; it saw the opening up of the world via the rise of television, the satire boom and the questioning of authority. In short, the 'swinging sixties' witnessed the death of deference.[92] And these shifts have escalated in recent decades. Following the end of the Cold War and the collapse of Communism old certainties continued to collapse. Tensions began to show.

Religious diversity also brought new challenges. As Rivers noted, while ' by the start of the twentieth century, English law had come to accommodate the full range of Christian belief and practice, as well as a significant Jewish minority, with reasonable success', the 'accommodation of other religions, growing primarily through immigration in the second half of the twentieth century, had not been as complete or successful'.[93] The Judeo-Christian legal framework which treated the Church of England as the norm was no longer fit for purpose given the significant presence of non-Christian religious minorities. Diverse forms of religion sometimes sat uncomfortably with 'traditional British values' and so social systems could no longer assume that religion was a benign force or necessarily a social good. [94]A new justification, a new plausibility, was offered in its place: multiculturalism.

B. Neo-Liberal Multicultural Juridification

Rivers has argued that multiculturalism 'effectively became part of New Labour's constitutional reform agenda' placing a 'formal re-commitment to principles of liberty and

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[90]See further, R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 5.
[91] C Taylor, *Varieties of Religion Today* (Harvard University Press, 2002) 80.
[92] H Carpenter, *A Great, Silly Grin: The British Satire Boom of the 1960s* (Perseus Books, 2000) 238.
[93]J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 377.
[94]As Davie has noted, the increase in religious pluralism which came as a result of the wave of immigration in the 1990s challenged 'widely held assumptions about the place of religion in European societies': G Davie, 'Is Europe an Exceptional Case?' (2006) *The Hedgehog Review* 23, 33.

equality for all'.[95] This was manifested in a rights-based rhetoric, a plethora of new religious rights formulated in statute and the growth of an academic industry that regarded the manifestation of religion and the accommodation of religious difference as a problem to be solved through law. Religion was now seen as just one subjective right amongst others. The right-based rhetoric disregarded any notion that religion was more than an identity claim but was rather a way of life, with its own system of norms, laws and morals. Religion was no longer seen as a public good but as private matter needing to be regulated by the market. As Rivers noted, under New Labour 'the provision of welfare came to be treated in typical "third way" fashion as provided privately but regulated publicly. So there has been a new openness to faith-based welfare provision, but the terms on which it is offered have been substantially those of the public sector, with its norms of non-discrimination on grounds of religion'.[96]

Religion became seen as a social problem to be solved by law where it offended law's expectations. The fact that religious believers were loyal to forms of authority other than the State became to be seen as a problem. The events of September 2001 changed the way in which the West thought and spoke about not only Islam but religion *per se*. This new context shaped the way in which religions operated in public life. Religion became seen as a social problem and attention was afforded to it. Legislators, judges and doctrinal lawyers embraced the narrative of the 'problematisation of religion' and were complicit in furthering it. This led to what I have referred to as the 'juridification of religion.'[97] This term is not to be found in Luhmann's works but Luhmann himself wrote of the way in which that there 'are now more lawyers and more laws than ever before' and this has led to an 'ever growing weariness, more

[95]J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 377.
[96] Ibid 395.
[97] See R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 10; R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 1; and R Sandberg, 'The Impossible Compromise' in R Sandberg (ed) *Religion and Legal Pluralism* (Ashgate, 2015) 1

complaints about the excessive number of legal regulating oppressing every free individual, and demands for deregulation, alternative and dispute resolution and de-bureaucratization'.[98]

In response to the decline of the welfare State and deference to authority, the social system of law interpreted and colonised other parts of social life in ways that it can understand it.[99] Law reconstructed religion its own terms.[100] Systems theory explains the way in which law reconstructs religion by simplifying religious beliefs into actions which law can understand.[101] King predicted that law would reconstruct religion 'essentially as those customs, rites and rituals which in the public domain come to symbolize statements of faith and holiness ... as rights of worship and performance of ritual.'[102] This has clearly occurred with Article 9 ECHR talking of the right to manifest in 'in worship, teaching, practice and observance' and with the charity law definition of religion requiring 'faith in a god and worship of that god.'[103] King's suggestion that law's reconstruction of religion would likely see each religion 'as constituting for law a set of rights' which would often result in judges 'seeing it in terms of some external authority' such as 'a law, God's law, Islamic law' has proved prophetic.[104] Courts and tribunals have indeed assumed a link between religious doctrine and the behaviour of claimants and have regarded religions as homogenous groups.

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[98]N Luhmann, *Law as a Social System* (Oxford University Press, 1993 / 2004) 272.

[99] In the words of King and Thornhill: 'If one takes a cynical perspective, law could well be seen as constructing a make-believe world which simplifies psychological, political, economic and other "realities" to enable it to reject all knowledge which threatens to undermine the validity of its normative communications': M King and C Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, 2003) 54.

[100]M King, The Muslim Identity in a Secular World' in Michael King (ed) *God's Law Versus State Law* (Great Seal, 1995) 91,107.

[101] For Teubner 'the juridification of social phenomena' results from the way in which applying law's binary code distorts social realities: G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) 13 *Cardozo Law Review* 1443, 1455.

[102]M King, The Muslim Identity in a Secular World' in Michael King (ed) *God's Law Versus State Law*(Phoenix: Great Seal, 1995) 91, 108.

[103]*Re South Place Ethical Society* [1980] 1 WLR 1565at 1572. Note that this definition may be questioned by the new wider definition of religion under registration law in *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, as discussed R Sandberg, 'Defining the Divine' (2014) 16 *Ecclesiastical Law Journal* 198 and R Sandberg, 'Clarifying the Definition of Religion under English Law: The Need for a Universal Definition?' (2018) 20 *Ecclesiastical Law Journal* 132.

[104]M King, The Muslim Identity in a Secular World' in Michael King (ed) *God's Law Versus State Law* (Great Seal, 1995) 91, 108, 110.

The Human Rights Act 1998 and the new laws on religious discrimination have led domestic courts and tribunals to place emphasis upon whether the claimant's actions were obligatory according to the religion in question,[105] a stance that has provoked criticism by the European Court of Human Rights.[106]

This means that law excludes as irrelevant any aspects of religion that do not process a legal character. Luhmann noted that where law 'refers to extra-legal rules' then 'these norms attain legal quality only with this reference.'[107] This seems similar to the judgment of Laws LJ in the Court of Appeal decision in *McFarlane v Relate*[108] that 'law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves'. The social system of law will only recognise and protect what it recognises in its own terms. This means that discourse needs to be framed in the language of law and that other social systems are devalued. This has meant that religion has become regarded by law as a legal right, an identity claim that is part of and no greater than any other of the 'secular' human rights canon. This has excluded the notion that religion can act as law. The social system of law does not see religion as its rival. Rather, it downplays religion by presenting it as having a narrower focus. As Rivers has observed:

> 'The idea that religions command respect on the part of secular government institutions because they consist of, or contain, autonomous systems of law is being

[105] See, especially *R (on the Application of Playfoot (A Child) v Millais School Governing Body* [2007] EWHC Admin 1698 and *Eweida v British Airways* [2010] EWCA Civ 80
[106] *Eweida and Others v United Kingdom* (2013) 57 EHRR 8. See, further, R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 5 and R Sandberg, 'The Future of Religious Freedom' in S Smet and E Brems (eds) *Conflicts between Human Rights in the Case Law of the European Court of Human Rights* (Oxford University Press, 2017) 130.
[107] N Luhmann. *A Sociological Theory of Law*, 2nd edn (Routledge. 1983/ 2014) 284.
[108] [2010] EWCA Civ 880 at para 23.

> lost in the inexorable rise of a dominant state-individual paradigm and the embrace of state regulation'.[109]

The focus is on individual subjective religious beliefs rather than upon religions as autonomous groups and sources of belonging. The law distorts religions as voluntary organisation, regarding them in the same way as gold clubs or other recreational activities. Believers and adherents are seen as members, autonomous individuals who are always free dot terminate their membership who have a string-free 'right to exit'.[110] The framing and colonising of religion as a subjective right allows it to be balanced and made subordinated to other subjective rights. Moreover, it protects, increases and perpetuates the role of law. Luhmann regarded the rise of subjective rights as being 'probably the most important achievement of the evolution of law in modern times.[111] Systems theory regards the rise of subjective legal rights as an internal development functioning as a 'self-description' by law designed to preserve its unity. Subjective rights allow law to overcome what Luhmann referred to as 'the paradox of freedom' namely 'the necessity of the limitations of freedom as a condition for freedom'.[112] This refers to the way in which law itself defines freedom by reference to its conditions. Human rights provisions such as Article 9 ECHR provide an example of this: Article 9 circumscribes defines religious freedom by reference to its limitations in Article 9 (2). Crucially, this provides law with a means by which to decide what is protected (and what is not protected) by these provisions whilst not admitting that the

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[109] J Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 394.
[110]The right to exit argument has been much criticised. See Sandberg and S Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137, 147. Shachar argued that this 'right to exit offers no comprehensive approach at all' because it imposes 'the burden of solving conflict upon the individual' whilst 'relieving the state of any responsibility for the situation'. As she puts it: 'The right to exit rationale forces an insider into a cruel choice of penalties: either accept all group practices – including those that violate your fundamental citizenship rights – or (somehow) leave': A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001) 41.
[111]N Luhmann. *Law as a Social System* (Oxford University Press, 1993 / 2004)269.
[112]Ibid; R Nobles and D Schiff, 'Introduction' in N Luhmann, *Law as a Social System* (Oxford University Press, 2004) 1, 30.

process is tautological. As Luhmann put it, this 'juridifies arbitrariness.'[113] The rise of subjective rights perpetuates and increases the domain of the law while furthering thedistance between the legal system and society at large since the framework is increasingly self-referential and so excludes non-specialists.[114]

This can be seen in the way in which law creates binary solutions. King predicted that law's construction of religion would mean that 'faced with incompatible explanations, individuals are often forced to make difficult choices between one or the other.'[115] The restrictive interpretation of religious rights under English law has led to such a situation, which I have termed elsewhere as an 'impossible compromise'.[116] The reasoning of the judiciary rests upon a 'binary' understanding of 'either your citizenship rights or your religion' which does not allow the court to consider fully on the merits of the case. The specific situation rule has been relied upon to hold that there is no breach of a person's religious rights where that person can choose to manifest their religion elsewhere, usually outside the public sphere.[117]This same tendency can be seen in relation to religious tribunals where emphasis has been placed upon the 'right to exit' argument which states that the role of the State should be limited to ensuring that at-risk group members are able to leave if they do not agree with their group's practices. These restrictive approaches wrongly limit people into pre-defined identities, assume an equal playing field in terms of power relations and expect

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[113]N Luhmann. *Law as a Social System* (Oxford University Press, 1993 / 2004) 269.
[114]Ibid 419.
[115]M King, The Muslim Identity in a Secular World' in M King (ed) *God's Law Versus State Law* (Great Seal, 1995) 91, 112.
[116] R Sandberg, 'The Impossible Compromise' in R Sandberg (ed), *Religion and Legal Pluralism* (Ashgate, 2015) 1.
[117] The rule was developed in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 stated that there was no 'interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience': para 23. This approach was criticised in *Eweida and Others v United Kingdom* (2013) 57 EHRR 8. See further R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 5 and R Sandberg, 'The Future of Religious Freedom' in S Smet and E Brems (eds) *Conflicts between Human Rights in the Case Law of the European Court of Human Rights* (Oxford University Press, 2017) 130 and M Hill, 'Religious Symbolism and Conscientious Objection in the Workplace'(2013) 15 *Ecclesiastical Law Journal* 191.

people to act in rational ways. A systems theory approach not only explains this development but also highlights the change in thinking that is needed. The binary options offered by law need to be understood as part of its fears of de-differentiation.

C. The Challenges to Neo-Liberal Multicultural Juridification

This multicultural right-based approach has been found wanting as two social systems of law and religion competed with each other for social influence. The first challenge to Neo-Liberal Multicultural Juridification can be said to have come from religion; the second can be said to come from law. First, juridification led to changes in the social system of religion as religion fought back against law's colonialisation. Like other modern theorists on secularisation,[118] Luhmann contended that religion will prosper if it adapts to the new functionally differentiated society. The effect of Neo-Liberal Multicultural Juridification is the self-description of religion as a social system under fire. It is the very notion that religion cannot be confined to its social system, the claim that religion has a place in the public sphere, which causes concern. This leads religion to do more than adapt to functionally differentiated society. Religion now adapts to take its place as part of a new functionally re-differentiated society. This entails the acceptance of and making the argument for religious groups fulfilling functions that have been considered to be the preserve of other social systems and the State. In pre-modern societies, religions dealt with legal disputes religiously. The rise of functional differentiation meant that legal disputes were dealt with by law and law was seldom concerned with religion; the stance of Liberal Tolerated Agnosticism. Under Neo-Liberal Multicultural Juridification, by contrast, law began treating religion as law and denying religion a place in the public square. Religion, however, challenged this and now in their dealing with disputes dealt with them both religiously and legally. Religious legal systems

[118] See, e.g., J Casanova, *Public Religions in the Modern World* (University of Chicago Press, 1994) and U Beck, *A God of One's Own* (Polity, 2010).

began to operate as social systems in their own rights, acting against the backdrop of law's juridification.

The term 'politicisation' of religion' can be used to refer to the way in which some religious groups have increased the volume of their voices in the public sphere.[119] The historian Callum Brown has observed that in the last decade of the twentieth century 'in the midst of overall decline in popular religiosity, British religion showed signs of increasing seriousness and militancy'.[120] He wrote that this was 'an uneven and in some ways imperceptible process and one that only became really noticeable in the early twenty-first century'. The growth of the Internet helped to foster the 'growing opportunities for vigorous minorities' both liberal and conservative to 'argue their cases, achieve success and push forward agendas'.[121] This increasing 'politicisation' of religion' is a response to and challenge to Neo-Liberal Multicultural Juridification.

Possibly more of a challenge, however, has come from law itself. Law overreached itself and attempted to justify this with a new plausibility which emphasised individual autonomy. This reflected what Charles Taylor and others have referred to as the 'subjective turn'.[122] This refers to the way in which the 'subjectivities of each individual became a, if not the, unique source of significance, meaning and authority'.[123] It describes the increased focus people placed upon the construction and re-construction of multiple personal identities. This postmodernist focus on identity (re)construction perpetuates the framing of religion as an identity claim. This has become problematic not only because it leads to the battle or trumping of rights but also because, ironically, it has led to the weakening of law. A focus on individualism and autonomy has led to the promotion of private ordering and the privatisation

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[119] R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) chapter 5..
[120] C G Brown, *Religion and Society in Twentieth-Century Britain* (Pearson, 2006) 297.
[121] Ibid 309.
[122] C Taylor, *The Ethics of Authenticity* (Harvard University Press, 1991) 26. For discussion see R Sandberg, *Religion, Law and Society* (Cambridge University Press 2014) 161-167.
[123]P Heelas and L Woodhead, *The Spiritual Revolution* (Blackwell, 2005) 3-4.

of justice.[124] We have seen the increasing localisation of public services where services hitherto provided by the welfare State are provided instead by small groups, often community based, sometimes public in nature and other times private. This development calls into question any neat dividing line between the public and the private and so framing the debate as being about the role of religion in the public sphere therefore misses the point and presupposes ideals of differentiation that are now passé. The roll-back of the welfare state has resulted in the retreat of law: cuts to legal aid have resulted in the rise of non-legal means of dispute resolution and / or an increase in the number of non-law specialists engaged in law work. This challenges law's vision of itself as being a self-contained, all-encompassing and specialist world. The uniqueness of law has been undermined by law's emphasis upon individualism. Emphasising individual autonomy has undermined the communal nature of law. The struggle is on for a new plausible way that law can represent itself and that of religion. And this is in part the task of legal academics that have previously formed (often unwittingly) Law and Religion as a legal sub-discipline based on liberal premises. This is likely to require a radical rethink. Indeed, one response might be to follow the work of Winnifred Fallers Sullivan, and to deny religion separate protection and to subsume religion within other claims.[125] This could entail abandoning the Law and Religion paradigm entirely or at least refining it.

[124] R Sandberg and S Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137; R Sandberg and S Thompson, 'The Sharia Debate: The Missing Family Law Context' (2016) 177 *Law & Justice* 188

[125] W F Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2005).

4. Religious Law

Until the 2008 speech by the then Archbishop of Canterbury,[126] the Law and Religion academic community largely ignored religious law. Literatures had emerged to varying extents dealing with the laws of particular religious communities – the Ecclesiastical Law Society and the LLM degree in Canon Law at Cardiff University notably leading to the production of a significant literature on the law of Anglican churches – but little attention was paid to religious law generally and the extent to which it interacted with the law of the State. A mostly theoretical literature on legal pluralism had developed mostly separate to the field of Law and Religion studies.[127] A systems theory approach provides an explanation for this and for the focus that has emerged following the Archbishop's lecture on the conflict of religious law and civil law and on the question of enforcement of religious law by State authorities. The explanation for both of these trends is the legal system's failure and desire not to regard religious law as law and its perception that 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 only provide the diagnosis to the problem of the neglect and misunderstanding of religious law. It also provides the cure. The following will fall into two sections. The first will explore how a systems theory approach recognises religious law as law while the second will explore how systems theory can explain and justify the operation of religious adjudication, not as evidence of de-differentiation but as a further process of differentiation whereby religious legal systems are seen as autopoietic systems in their own right. Though derived from the work of Luhmann, this argument advances his theory in that it does adopt his forward moving model of history.

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[126] R Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262.
[127] As noted by R Sandberg (ed), *Religion and Legal Pluralism* (Ashgate, 2015) which sought to rectify this.

A. Religious Law as Law

Luhmann's theory underpins the pervasiveness of law. The opening paragraph to *A Sociological Theory to Law* underscores not only the legal dimension of social life but also the way in which all agencies social systems have a legal dimension:

> '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'. [128]

Luhmann's understanding of law is not limited to State Law.[129] It accepts legal pluralism, the notion that 'it is normal for more than one "legal" system to co-exist in the same social arena'.[130] Indeed, for Luhmann, law 'is not confined to communication occurring within legally regulated procedures, but also includes that of daily life insofar as it raises legal

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[128]N Luhmann. *A Sociological Theory of Law* (2nd edn, Routledge 1983/ 2014) 1.

[129] Several critics, however, point out that Luhmann's concept of law is 'openly parasitic upon the state law model' given that the operation of the binary code rests upon common legal centralist ideas about the notion of law: B Z Tamanaha. *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 103. See also M M Kleinhans and R A Macdonald, 'What is a *Critical* Legal Pluralism?'12(2) (1997) *Canadian Journal of International Law and Society* 25, 39.

[130] B Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 171.A number of different definitions and typologies of 'legal pluralism' have been suggested. See, e.g., A Griffiths, 'Legal Pluralism' in R Banaker and M Travers (eds) *An Introduction to Law and Social Theory* (Hart, 2002) 289. The most important distinction, however, is between the 'old' colonial legal pluralism (epitomised by M B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975)) and the 'new' legal scholarship (characterised by J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1) which suggests that 'there are many 'legal' orders operative in society, of which State law is just one, and often not the most powerful one'. The focus here is on this newer understanding of legal pluralism.

questions or otherwise registers or repudiates legal claims'.[131] A systems theory approach to legal pluralism transforms the concept of legal pluralism.[132] As Teubner pointed out, in the same way that legal pluralism 'turned from the law of colonial societies to the laws of diverse ethnic, cultural and religious communities in modern nation-states', a systems theory approach allows it 'to make another turn - from groups to discourses'.[133] 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'.[134] 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':[135] the way in which legal pluralist theory while rightly rejecting legal centralism by asserting the normality of there being more one 'legal' system co-existing in the same social arena,[136] does not then provide a means whereby such 'legal' norms can be identified and distinguished from other forms of social control.[137] A

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[131]N Luhmann, *The Differentiation of Society*(Columbia University Press, 1982) 122. For Luhmann, the very concept of the State is 'a paradox or fiction which the political system itself produces (for simplicity's sake)' in order to perpetuate itself: M King, and C Thornhill, *Niklas Luhmann's Theory of Politics and Law*(Palgrave Macmillan, 2003) 77.

[132] See also R Nobles and D Schiff, 'Using Systems Theory to Understand Legal Pluralism: What Could be Gained?' 46(2) (2012) *Law and Society Review* 265.

[133] G Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in G Teubner (ed.),*Global Law Without a State* (Ashgate, 1997). 3.

[134] G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991) 13 *Cardozo Law Review* 1443, 1451.

[135] R Sandberg, 'The Failure of Legal Pluralism' (2016) 18 *Ecclesiastical Law Journal* 137; R Sandberg, 'The Lure of Luhmann: A Systems Theory of Law and Religion' in R Sandberg, N Doe, B Kane and C Roberts, Handbook *of the Interdisciplinary Study of Law and Religion* (Edward Elgar, 2019) 221.

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

[137] See Tamanha's critique that legal pluralist's work suffers 'from a persistent inability to distinguish what is legal from what is social': B Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 171, 174. This failure has meant that even the founders of modern legal pluralism have seemingly turned their backs on the term. Griffiths has now argued that the word 'law' should be 'abandoned altogether for purposes of theory formation in sociology of law' with the terms 'normative pluralism' or 'pluralism in social control' as his preferred candidates to replace 'legal pluralism' while Moore has written that distinctions must

social systems approach shows that we can recognise 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. It allows the definition of Law to be kept in line with social change without either having to resort to an external objective definition with set criteria or a wholly subjective approach that allows individuals to define what is law on a case by case basis.[138] As Nobles and Schiff point out, a focus on coding has more potential to extend the study of what is legal beyond a focus on formal sources than does an approach that identifies as "law" only what a significant number of participants, if questioned, would describe as "law"'.[139]

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.

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be made between governmental and non-governmental norms of social control: J Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' (2005) 8 *Current Legal Issues* 49, 63-64; S Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999' in S Falk Moore (ed), *Law and Anthropology: A Reader* (Wiley, 2005) 346, 357.

[138] For subjective approaches, see, e.g., Tamanaha's 'social theory of law' (B Z Tamanaha, *Realistic Socio-Legal Theory* (Oxford University Press, 1997) chapters 5 and 6 and B Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 162 et seq), the 'critical' legal pluralist' approach of Kleinhans and MacDonald (M MKleinhans, and R A MacDonald, What is a *Critical* Legal Pluralism?' (1997) 12(2) *Canadian Journal of International Law and Society*25) and Codling's concept of 'subjective legal pluralism' (A R Codling, 'A Critical Pluralist Analysis of *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*' (2012) 169 *Law & Justice* 224; A R Codling, 'What do you Believe? Taxonomy of a Subjective Legal Pluralism' in R Sandberg (ed) *Religion and Legal Pluralism* (Ashgate, 2015) 199).

[139] They point out that unlike Tamanaha's theory: 'Systems theory proceeds on the basis that the process of inclusion within a functional social subsystem is not established through consensus (the number of individuals who express a similar view) but through the operations of that system' (R Nobles and D Schiff, 'Using Systems Theory to Understand Legal Pluralism: What Could be Gained?' 46(2) (2012) *Law and Society Review* 265.274-276).

Whenever they produce communications based on the binary code lawful/unlawful then that, according to systems theory, is law.

B. Religious Legal Systems as Autopoietic Systems

A systems theory approach allows us to take a further step. Applying Luhmann's theory, it can regard religious legal orders as autopoietic systems in their own right.[140] 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.[141] The notion that social systems could produce further systems is recognised in Luhmann's theory which stated that 'we have to presuppose it is possible to form further autopoietic systems within autopoietic systems'.[142]He wrote that 'differentiations become conditions for further differentiations' and that religious organisations provided an example of 'autopoietic systems that operate on their own'.[143] 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 provide 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 as shown by the reaction to Rowan Williams' 2008 lecture on religious law.

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[140] For discussion of the meaning of the term 'legal order' see M Malik, *Minority Legal Orders in the UK* (The British Academy, 2012) 22-24.
[141] This develops the argument that religious law is necessarily and by definition both religious and legal: R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 9; R Sandberg, 'The Reformation of Religious Law' (2017) special *Quaderni di Dritto e Politica Ecclesiastica* 97.
[142]N Luhmann, *Law as a Social System.* (Oxford University Press, 1993 / 2004) 467.
[143]Ibid; N Luhmann, *A Systems Theory of Religion* (Stanford University Press, 2000 / 2013) 165.

Understanding religious legal systems as autopoietic 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 organisations (religious and non-religious) perform functions which it was thought had become the preserve of the State. This approach would question Luhmann's implicitly forwarding moving model of history by showing how further differentiation can occur in a less centralised way.[144] The neo-liberal roll-back of the State manifested in the form of legal aid cuts and the increased reliance upon voluntary organisations rather than State institutions can be understood in systems theory terms as a process of re-differentiation where functions are differentiated further but backwards: specific functions return from centralised State –centric social institutions (like law) to social systems which formerly performed such functions (like religion) but the difference is that the latter (religion) is now expected to behave like the former (law) and so develops in a way that is outside its core function. This explains the existence and increasing use of religious legal orders. 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 that develop ways to charge these functions in a way that blends religious and legal discourses and behaviours. This insight transforms the way in which religious legal systems are regarded and places them firmly in the context of the privatisation

[144] There is the risk, however, that this re-differentiation may in time bring about the same problems as functional differentiation once did and that we will be caught in a vicious circle.

of disputes, especially in the context of family law.[145] 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.

Re-differentiation should transform not only how religious law is understood but also how Law and Religion is understood. There is a need to move away from the dominant narrative that provides and accepts an implicitly forward moving model of history. The plausibility narratives constructed by law seek to cement law's own autonomy by subscribing to what Gordon famously referred to as the 'dominant vision of evolutionary functionalism' whereby 'an objective, determine progressive social evolutionary path' is naturally followed.[146] The conception of law as being certain and universal with imperfections seen as taints that will naturally fade and disappear underpins such prevalent notions such as that the 'common law over time tends to work itself pure', that legal doctrine has become 'ever more certain and predictable as well as more adaptable to social needs; and that the law has 'become more and more efficient'.[147] This explains why the legal system remains largely faithful to the forward moving linear progress narrative of functional differentiation. This narrative sees the operation of religion in the public sphere – doing things that law also does – as evidence that secularisation is incomplete.

Academic lawyers are complicit in perpetuating this narrative. The focus in both Religion Law and Religious Law scholarship is upon the role of the State in recognising and regulating religious manifestations. Religion's insistence that it has a place in the public sphere is regarded as a problem to be solved.

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[145] For further discussion see R Sandberg and S Thompson, 'The Sharia Debate: The Missing Family Law Context' (2016) 177 *Law & Justice* 188

[146] RW Gordon, 'Critical Legal Histories' in RW Gordon, *Taming the Past: Essays on Law in History and History in Law* (Cambridge University Press, 2017) 220, 226-227.

[147] Ibid 229.

There is a need for the academic study of Law and Religion to go outside the system. This, of course, is easier said than done. A systems theory approach lends itself to hermeneutic and linguistic analyses but these do not escape the paradigm. They are exercises in de-construction more than re-construction. As I have argued in a different context,[148] what is needed is a subversive approach. Such an approach builds upon the field of Critical Legal Studies in that it questions not just the law and its interpretation but the foundations and architecture that surround and perpetuate it.

As Roger Cotterrell put it, 'a critique of law must put all taken-for-granted assumptions about the nature of law in issue'. [149] For Gordon, a critical approach 'produces disturbances in the field - that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present'.[150] The key characteristic that makes it subversive is that it changes the angle and lens in which the law is seen. A subversive approach, such as feminism,[151] serves 'to disrupt the narratives, values, structures, priorities and questions of the sub-discipline' by moving to the centre what was previously on the periphery and focusing on the question of power.[152] This is likely to create a 'disturbance of unknown magnitude' which 'may well involve dismantling the status quo and creating something entirely new'.[153]

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[148] R Sandberg, 'The Time for Legal History: Some Reflections on Maitland and Milsom Fifty Years on' (2018) 180 *Law & Justice* 21; R Sandberg, 'Roman Canon Law in the Church of England: Maitland's Legacy on the Study of Religious Law' in R Sandberg (ed) *Leading Works in Law and Religion* (Routledge, 2019) 162; R Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, forthcoming).
[149] R Cotterrell, 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' (1987) 14(1) *Journal of Law and Society* 77, 79.
[150]R Gordon, 'The Arrival of Critical Historicism' (1997) 49 *Stanford Law Review* 1023, 1024.
[151] On which see the essays in M A Failinger, E R Schlitz and S J Stabile (eds) *Feminism, Law, and Religion* (Ashgate, 2013).
[152] S Thompson and R Sandberg, 'Multicultural Jurisdictions: The Need for a Feminist Approach to Law and Religion in R Sandberg (ed) *Leading Works in Law and Religion* (Routledge, 2019) 179.
[153] Ibid 196.

5. Conclusion

Despite Luhmann's underserved notoriety, social systems theory has been used to explain developments in various areas of law.[154] It has been used to understand jurisprudence as part of law's self-description.[155] This article uses social systems theory to explore Law and Religion, not only to explain developments in English law but crucially to see developments in legal academia – namely the development of Law and Religion as a legal sub-discipline – as part of the social system of law. Systems theory has been used to explain how Law and Religion has stagnated as an academic field and also how a major re-conceptualisation is now required.

Systems theory transforms the way in which we look at religion law. It explains the reason for current controversy and ill-ease surrounding religious rights and the place of religion in the public sphere. This is the result of the persuasiveness of functional differentiation and the inadequacy of the programming and rationalising offered by the legal social system. For a time, the change in the representation of religion by law was given degree of plausibility by means of a move from Liberal Tolerated Agnosticism to Neo-Liberal Multicultural Juridification. However, now the plausibility offered by Neo-Liberal Multicultural Juridification is being challenged by the fight back by and politicisation of religion as well as by the overreach of law. Law's focus on individualised autonomy has been its undoing.[156] It has resulted in the retreat of law as religion and other social systems perform specialised functions previously provided by law. Law's representation of religion as an identity claim has questioned why legal protection ought to be given. This has led to a search for a new plausibility and the absence of that new rationale explains the stagnation of Law and Religion scholarship.

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[154] See, e.g., R Nobles and D Schiff, *Observing Law though Systems Theory* (Hart, 2012).
[155] R Nobles and D Schiff, *A Sociology of Jurisprudence* (Hart, 2006).
[156] R Sandberg and S Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137.

Systems theory also transforms the way 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 destabilising manifestations of de-differentiation. Following the Archbishop's lecture,[157] this led to a fixation with the question of the compatibility of religious and State law and the enforcement of the former by the latter. Neo-Liberal Multicultural Juridification has again set and constrained the way in which legal actors (including academics) have perceived the issue: it has been understood as a problem that should be fixed, a relic that is at odds and needs to be understood against modern standards and a separate issue that in no way reflects wider concerns about the legal system brought on as a result of neo-liberal changes.

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. A systems theory approach shows those within the social system of law cannot see religious law as law and have normalised 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, providing 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 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). This allows religious institutions that produce legal communications through legislation or adjudication to be seen as social systems in their own right.

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[157] R Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262.

Critically, this insight rejects a forward moving model of history to see re-differentiation rather than de-differentiation, as the response to the neo-liberal rollback of the State. This realisation reframes the debate about religious tribunals from confusion and anguish at their very existence to seeing them as being part of the privatisation of justice and to when and how the State should insist on safeguards and the nature of such safeguards. This does not immunise such institutions from critique; rather, it means that critique becomes more informed and focused. A systems theory analysis therefore explains the inadequacy and of how the legal social system (including Law and Religion academics) conceive of religious law but also points to a way forward. This radical departure is needed in relation to religion law and in relation to Law and Religion generally if the subject is to escape its current malaise. There is a need for a new plausibility, a new way of looking at and framing the issue. As with religious law, there is a need to move beyond the forward moving model of history with its narrative of evolutionary progress and its obsession with the State. Although neo-liberalism has seen the roll-back of what the State does, the expectations of the State and its self-importance has not declined accordingly. Legal actors including academics remain infected with liberal assumptions and devoted to a top-down centralised understanding of legal authority. A new and subversive approach is needed not just to question but to deconstruct and reconstruct.[158]

The academic sub-discipline of Law and Religion is part of the social system of law and its preoccupations, biases and focuses reflect this. That is why there is a need for an approach that attempts to go beyond this to questions the hands, thoughts and perspectives that have shaped and constrained the sub-discipline to date. Law and Religion is not alone in this regard. The same is true of most if not all legal academic sub-disciplines. Yet, perhaps

[158] For a discussion of how a feminist approach could achieve this see S Thompson and R Sandberg, 'Multicultural Jurisdictions: The Need for a Feminist Approach to Law and Religion in R Sandberg (ed) *Leading Works in Law and Religion* (Routledge, 2019) 179.

Law and Religion is well placed to become a trail-blazer in this regard. After all, its subject matter necessarily involves the study of the marginalised and those often overlooked or made invisible by law. It is ironic that the lens applied by Law and Religion focusing on the reaction and responsibility of the State has ignored the natural focus of the sub-discipline. New radical ways of thinking are required that question and disturb every stone, every foundation, of the architecture that Law and Religion has been built upon.