Stato, Chiese
e pluralismo confessionale

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Law and Religion: Destruction and Reconstruction *

*Diritto e religione: decostruzione e ricostruzione **

ABSTRACT. Negli anni Quaranta, l'economista austriaco Joseph Schumpeter coniò il concetto di "distruzione creativa" per descrivere come il capitalismo si sviluppa attraverso lo smantellamento incessante e continuo di vecchi paradigmi. Nel panorama attuale, il britannico Russell Sandberg e l'americano Marc. O De Girolami si stanno affermando come i contemporanei "distruttori creativi" nel campo del diritto e religione. Evidenziando le patologie che ostacolano lo sviluppo intellettuale della disciplina e proponendo possibili soluzioni, il presente contributo introduce e analizza due recenti opere dove gli Autori offrono spunti per de-costruire criticamente il diritto e religione e proiettarlo verso il futuro.

ABSTRACT. In the 1940s, Austrian economic Joseph Schumpeter coined the concept of "creative destruction" to describe how capitalism evolves through the relentless and continuous dismantling of its old paradigms. Fast forward to the present, British and American scholars Russell Sandberg and Marc O. De Girolami are emerging today as contemporary "creative destroyers" in the field of law and religion. Pointing to the pathologies affecting the intellectual development of the discipline and prescribing possible remedies, this paper introduces and discusses two recent works by the Authors as part of their efforts to critically deconstruct law and religion and project it into the future.

1 - Introduction

In 1942, amid the Second World War and at a time when the structure of future economic systems - capitalism vs. socialism - was beginning to be questioned, the concept of "creative destruction" began to emerge in the realms of economics and political sciences. It was Austrian economist Joseph Schumpeter who introduced this term to academia with his classical book *Capitalism, Socialism, and Democracy* - both a staunch defence of the free-enterprise system as well as a diagnosis of its inevitable demise[1].

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To Schumpeter, the capitalist system was doomed to self-destruction[2]. His prediction was that the successes of the free-market system would spawn, over time, a large class of bourgeoisie intellectuals hostile to the very policies of privatisation, deregulation and liberalisation on which their own existence and fortunes depended[3]. In a profound irony, capitalism itself would usher in the conditions for its own decline: a socialist middle class fostering governments to contain rather than liberate markets. Capitalism, by its own devices, was thus destined to implode from within, spiraling into a paradoxical state of entropy where entrepreneurship fades, socialism fills the vacuum, and economies stagnate.

Against the attacks perpetrated by bourgeoise elites, for Schumpeter only the "creative destruction"[4] driven by competitive entrepreneurs - their relentless dismantling of old arrangements to continuously innovate industrial life - could counteract the sabotage. Entrepreneurial spirit and "industrial mutation"[5] - with the continuous creation of new markets, goods, commercial and financial strategies - were thus heralded as the fuel for the capitalist engine to endure and, in the long run, prove its superior performance over socialism.

Fast forward to a new time and place in the future - beyond the post-World War II ideological battle between capitalism and socialism, and within the realm of twenty-first-century law and religion. It is 2024, and with his latest book, *Rethinking Law and Religion*[6], British scholar Russell Sandberg is emerging as a bold and contemporary "creative destroyer" of the microcosm he once contributed to shape in England, Wales and across Europe. Without explicitly referencing Schumpeter's idea of "creative destruction", let alone proclaiming himself an anointed "creative destroyer", Sandberg nevertheless appears to share some common ground with the Austrian economist.

Much like Schumpeter's century-old prediction of capitalism self-collapse, Sandberg latest work offers a similarly raw diagnosis of the dying of law and religion at the hands of its own creators. In echoes of Schumpetherian thought, for Sandberg only an act of regeneration by new, creative generations of scholars could preempt its post-mortem. As the state of the field stands today, Sandberg asserts, "there is need to

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[1] The most recent edition of the book, republished in 2010 by Routledge, is the one referenced in this introduction.

[2] **J.A. SCHUMPETER**, *Capitalism, Socialism and Democracy,* Routledge, London, 2010, p. 53.

[3] **J.A. SCHUMPETER**, *Capitalism,* cit., pp. 128-130.

[4] **J.A. SCHUMPETER,** *Capitalism,* cit., p. 73.

[5] **J.A. SCHUMPETER,** *Capitalism,* cit. (describing "industrial mutation" as the process "that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one").

[6] **R. SANDBERG**, *Rethinking Law and Religion,* Edward Elgar Publishing, Cheltenham, 2024). The eBook version of *Rethinking Law and Religion* is priced from £20/$26 from eBook vendors while in print the book can be ordered from:< *https://www.e-elgar.com/*>.

question, to crack open assumptions and to demolish"[7] the status quo to save law and religion from law and religion scholars - himself included. By taking at face value conventional orthodoxies about the law and the legal meaning of religion - orthodoxies that he himself helped establish - Sandberg predicts that this academic field is destined to entrench itself to the point of stagnation and eventual disappearance[8]. To overcome this, there is a need to "begin again"[9] - a need for "creative destruction" in the face of sweeping social change.

Similar and parallel predictions are echoed by American scholar Marc. O de Girolami on the other side of the Atlantic. In his 2024 essay, *The Death and New Life of Law and Religion*[10], De Girolami recounts how the social response of an increasingly ideologically-fragmented polity to American theories of "religious freedom for all" is now seriously implicating and re-conceiving religion in new ways. Central to this discussion is the issue of religion and the substitution of its traditional codes and symbols with something new. "Is it really possible to have law and religion as a field if religion has been drained of meaning?"[11] - thus asks the Author. For law and religion to address the slippery slopes it had itself created, revitalise "religion" in its legal terms, and avoid self-inflicted death, this question requires a prompt response.

As will be discussed, De Girolami's essay is a fresh release that offers a timely companion to *Rethinking Law and Religion*, nuancing Sandberg's analysis over the ebbs and flows of an ever-changing social reality that questions the postulates of his home-field. To elaborate on this interaction, this paper is divided into six sections. *Section II, III* and *IV* provide a comprehensive analysis of *Rethinking Law and Religion*, while *Sections V* and *VI* discuss and read Sandberg's book in light of Marc. O. De Girolami's *The Death and New Life of Law and Religion. Section VII* concludes.

Wittingly or unwittingly, it will be shown how both Authors appear to work in concert - with Sandberg identifying new methodologies to bring the pathologies of contemporary law and religion to an end, before De Girolami discerns and points to the new beginnings of the field. And as every new beginning comes from a change of mind and sometimes even repentance, Russell Sandberg's *Rethinking Law and Religion* begins with a confession.

2 - Repentance

Repentance - this is the term Sandberg chose for the first section of his

[7] **R. SANDBERG**, *Rethinking Law,* cit., p. 226.
[8] **R. SANDBERG**, *Rethinking Law,* cit., p. 222.
[9] **R. SANDBERG**, *Rethinking Law,* cit., p. 206.
[10] **M.O. DE GIROLAMI**, *The Death and New Life of Law and Religion* in *Oxford Journal of Law and Religion,* 00, 2024, pp. 1-26.
[11] **M.O. DE GIROLAMI**, *The Death,* cit., p. 25.

book, where he interweaves the social, cultural, and political implications that laid the groundwork for law and religion as a new legal area of study in England and Wales with personal experiences and self-reflection. In this opening phase, Sandberg engages in what he describes as an exercise in "autoethnography"[12], seeking to pinpoint what has gone amiss with the development of the field of law and religion" and to "examine [his] own culpability"[13] as an active player in its formation. The first four chapters of *Repentance* are devoted to this critical reconstruction of the rise and fall of law and religion in England and Wales.

In this context, Sandberg's analysis begins by illustrating how, before the 1990s, the primary focus of inquiry was on the long-standing interaction between Christian churches and the state; while the study of how the law affected religions more generally was an afterthought. However, the early twenty-first-century saw the emergence of various social trends - particularly the moral panics about the presence of religions in the public sphere after 9/11 and growing demands for interdisciplinary work within universities - which gradually sparked interest on questions concerning non-Christian faiths and the law[14]. The proliferation of new regulations disciplining the life of minority denominations in the United Kingdom (UK) - especially concerning the wearing of religious garments and symbols in schools and workplaces - soon became the subject of specialised academic analysis[15]. New dedicated literature, scientific journals, book series[16], conferences, networks, research groups[17] and teachings began to flourish, contributing to the appearance of law and religion studies in UK law schools[18].

The year 2011was particularly significant for Sandberg, marked by

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[12] **R. SANDBERG**, *Rethinking Law,* cit., p. 12.

[13] **R. SANDBERG**, *Rethinking Law,* cit., p. 13.

[14] **R. SANDBERG**, *Rethinking Law,* cit., pp. 22-25.

[15] Despite the growing perception of religion as a social problem in the public mind, domestic legislation during these years also began to give effect to religious freedom rights and non-discrimination principles as guaranteed under international and regional frameworks of protection. See, for instance: Human Rights Act 1998; Employment Equality Regulation 2003; Equality Act 2006 (now Equality Act 2010). See: *ibidem.*, p. 23 (fn 41).

[16] For a first compilation of the law and religion literature at the turn of the first decade of the twenty-first century in the UK see: **R. SANDBERG**, *Silver Jubilee Bibliography: Ecclesiastical Law Publications 1987 -2011* in *Ecclesiastical Law Journal*, 14, 2012, pp. 470-1.

[17] In 1987, the Ecclesiastical Law Society was formed to promote the study of ecclesiastical and canon law in the UK, later expanding its focus to encompass law and religious studies from 1990 onward. 18-19 Later, in 2008 the Cardiff Centre for Law and Religion established "two new networks that focused more on the interaction between religions and the state: namely, the Interfaith Legal Advisers Network (ILAN) and the Law and Religion Scholars Network (LARSN)". See: **R. SANDBERG**, *Rethinking Law,* cit., pp. 18-19; 28.

[18] Much credit for expanding the canvas of law and religion research and teaching in the UK should be given to Cardiff Law Professor Norman Doe, whose major contributions to the emerging field are summarised in: **R. SANDBERG**, *Law and Religion*, Cambridge University Press, Cambridge, 2011, pp. 19-20.

the release of his *Law and Religion*[19]: the first UK textbook to explore the key themes, principles, and methods underpinning the emerging field. All in all, the novelty of this work laid in its attempt to systematise and elucidate the interaction between religion and various areas of law, ranging from constitutional and human rights law to discrimination ("with a particular emphasis on employment and education law")[20] and criminal law. Moreover, all legal issues were organised around the semantic pairing of "religion law" and "religious law" - terms that the Author used to distinguish between "the laws that apply to religious groups" and "the laws created by those religious groups", respectively[21]. This "religion law/religious law" dichotomy also served as a methodological device to delineate, for the first time, the boundaries and contours of law and religion as an emerging field.

Yet, by the Author's own admission, the choice of topics and methodology in *Law and Religion* notably reflected its own limitations. While the book successfully identified several areas of law applicable to religions, it failed, however, to demonstrate how law and religion should be seen as more than as a simple compilation of spurious legal issues (with some intrusions into religious laws) but as an area of study in its own right[22]. In other words, rather than elevating early-twenty-first-century law and religion to a new, fully-fledged discipline, Sandberg's creeping realisation was that he had instead contributed to downgrading it to a mere "sub-discipline" of legal studies - a label that still resonates today, condemning the field to a perpetual state of limbo. Put differently, while law and religion had grown enough for specialists in the area to engage in conversations among themselves within the field, it nevertheless remained an esoteric, miscellaneous subject with very limited impact outside its academic circle[23].

Sandberg's reflections on this stagnation are accompanied by an analysis of a second contributing factor to the field's decline: the lack of success in religious freedom litigation during the late-twenty and early-twenty-first centuries. This second issue is central to Sandberg's analysis in chapter five. Here the focus ranges from the poor responsiveness of British tribunals to religious arguments under Article 9 of the European Convention on Human Rights (ECHR)[24] to the European Court of Human Rights' (ECtHR) overemphasis on the margin of appreciation of

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[19] **R. SANDBERG**, *Law, cit.*

[20] **R. SANDBERG**, *Rethinking Law,* cit., p. 36.

[21] **R. SANDBERG**, *Rethinking Law,* cit., p. 34.

[22] **R. SANDBERG**, *Rethinking Law,* cit., p. 37 (where the Author, reflecting on *Law and Religion*, admits: "I made the error of conflating the field with the selective and limited coverage given by my book".)

[23] **R. SANDBERG**, *Rethinking Law,* cit., p. 228.

[24] The Author is referring to: *Ahmad v Inner London Education Authority* [1976] ICR 461; [1978] QB 36 (subsequently referred to the then European Commission of Fundamental Human Rights which declared the case inadmissible in: *Ahmad v UK* (1982) EHRR 126); and *R (on the Application of Begum) v Headteachers and Governors of Denbigh High School* [2006] UKHL 15 (no interference with article 9 ECHR).

states, the contractual powers of employers, and the freedom of employees to resign in religious freedom litigation. Throughout the chapter, Sandberg employs the term "paper tiger"[25] to encapsulate his critique not only of the limited effectiveness of Article 9 ECHR in past UK case law, but also of the limited impact of what has been hailed as a watershed moment in UK law and religion - the ECtHR decision *Eweida and Others v UK* (2013)[26]. Despite high hopes that this case would correct restrictive interpretations of Article 9 ECHR in the UK and broaden its overall application across the Council of Europe, Sandberg's conclusion however is that: "[i]n most cases, *Eweida* has been cited rather than applied"[27].

For Sandberg, however, these judicial shortcomings alone cannot fully explain why law and religion has struggled to emerge as an all-out field of study. While correlation may exist between the lack of success of religious freedom litigation before local and regional authorities and a sense of impotence among academics in advancing the field, causation is not necessarily implied. With this in mind, and drawing on his initial findings on the development of law and religion as a "sub-discipline" and his observations over a broad judicial tendency to downplay religious interests in court, Sandberg moves on to attempt a more exhaustive explanation behind the decline of the field. This is presented in chapters six and seven of *Repentance*.

In this context, Sandberg's main argument is that early-twenty-first century law and religion in England, Wales and Europe has developed upon the assumption that "the presence of religion in the public sphere is problematic"[28] - as also evidenced by the lack of attention to Article 9 ECHR arguments in cases concerning religious rights. Recognising this reveals how the mainstream European approach to law and religion has been excessively "legalistic"[29] - namely, too narrowly-focused on the posture of state laws towards religion, rather than also considering the posture of religions towards state laws. Should it persist on this current trajectory, Sandberg predicts, the field is destined to remain merely a state-centric, static compilation of reported decisions affecting religion, unable to expand into how religion itself can shape the

[25] This formula is borrowed from: **F.S. RAVITCH**, *Advanced introduction in Law and Religion,* Edward Elgar Publishing, Cheltenham, 2023) p. 77.

[26] *Eweida and Others v UK*, App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

[27] **R. SANDBERG**, *Rethinking Law,* cit., p. 62. A similar situation is particularly evident in the jurisprudence of the Court of Justice of the European Union (CJEU), which, since its very first case on religious freedom in private employment, appears to have deliberately disregarded the findings in *Eweida*. See: Case C-157/15, *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV* [2017] EU:C:2017:203. For a recent discussion on these developments: **M. HUNTER-HENIN**, *Religious Expression and Exemptions in the Private Sector Workplace: Spotting Bias*, in *Current Legal Problems*, 1, 2024, pp 1-25.

[28] **R. SANDBERG**, *Rethinking Law,* cit., cit., p. 90.

[29] **R. SANDBERG**, *Rethinking Law,* cit., p. 77.

law, and how legal and religious ideas continuously influence each other.

More than ever, there is need "to study law and religion as two distinct spheres not only in how they interact with one another, but also in how they see and reconstruct one another on their own terms"[30]. This is the lesson of American scholar John Witte[31], whom Sandberg commends for paving the way for a new interdisciplinary movement[32] in the United States (US) that combines the study of the legal dimension of religion with the "religious dimension of law"[33]. This refers to the set of beliefs, values and subjective experiences that give substance to the formal structures of law and religion and which, if taken seriously, would allow the field to thrive beyond the sole perspective of states.

Emphasis on this dimension is the reason why today the US is positioning itself as a global leader in law and religion, while Europe, in contrast, is marginalising the field from the legal mainstream and simultaneously limiting its potential to extend beyond the law - thus driving it towards implosion.

Echoing the Schumpeterian intellectuals born from the very capitalist system they contributed to stagnate, this is why Sandberg himself, by his own admission, is among those who devised the intellectual trappings that are now encasing rather than liberating the markets of law and religion. This is his confession.

3 - Reappraisal

Reappraisal - this is the title of the second part of *Rethinking Law and Religion*, where Sandberg explores how insights from other disciplines comparable to the field could help set in motion the "creative destruction" needed to move law and religion beyond the confines of state-centric legalism. To the Author, investigating alternative ways of thinking, questioning, and researching is therefore an essential intermediate step to reappraise the potential of law and religion before pursuing a path to reconstruct and regenerate it.

In the first section of *Reappraisal* (chapter eight), and before illustrating which disciplines could act as role models for change, Sandberg briefly expands his critique of an excessively-legalistic understanding of law and religion developed in Part I. He considers how

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[30] **R. SANDBERG**, *Rethinking Law,* cit., p. 77.

[31] See: **J. WITTE**, *The Study of Law and Religion in the United States: An Interim Report,* in *Ecclesiastical Law Journal*, 14, 2012, 327-354.

[32] The leading figures of this movement are in particular are "the Center for the Study of Law and Religion, founded at Emory University in 1982, and the international Center for Law and Religious Studies established at Brigham Young University in 2000." **R. SANDBERG**, *Rethinking Law,* cit., p. 66.

[33] For the sake of completeness, it should be noted that the teachings of Witte on the dialectical interactions of law and religion carry on the legacy of Harvard Law School Professor Harold J. Berman (1918–2007). For further discussion on Berman's legacy see *infra* at *Section V.*

such an approach unavoidably fails to address the power relations underpinning the field, meaning that a purely legalistic analysis of law and religion seldom employs critical thinking to question the status quo[34].

All in all, Sandberg's realisation that challenging often taken-for-granted power structures could be a fruitful starting point for change in law and religion originated from his very first encounters with feminist legal theory[35]. Insights from this scholarship made it clear to him how received knowledge over the historical role of dominant religions in shaping legal systems has not been sufficiently questioned and problematised. Acknowledging this would make law and religion studies much more similar to and comparable with other critical movements exploring imbalances and inequalities, such as law and gender or law and race[36]. Chapter nine and ten of *Reappraisal* are each devoted to the methodological contributions that these two comparators could offer to the study of law and religion.

In these contexts, Sandberg's analysis employs the lens of gender and critical race theory to investigate how these perspectives sharpen the focus on the structural religious biases and disadvantages that permeate state-religion interactions. Just like gender and race inequalities, religious inequalities too are the products of legal systems that perpetuate—directly or indirectly, wittingly or unwittingly—mainstream narratives of power (despite reforms in the name of universal social values). For law and religion academics who choose to acknowledge this, Sandberg argues, the task then becomes to continuously question claims of law's neutrality and impartiality toward religions, in order to progressively deconstruct and reprogram the terms of the debate[37]. Viewed this way, religion (like gender and race) possesses a disruptive function that enables scholars to rethink and reconstruct the law, while also challenging official constructions of religion that the status quo has established on its own terms[38].

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[34] **R. SANDBERG**, *Rethinking Law,* cit., p. 98.

[35] In recounting this, Sandberg author takes the opportunity to credit his colleague and fellow scholar at Cardiff, Sharon Thompson, for inspiring his new research trajectories through her published work in: **S. THOMPSON**, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice,* Hart, Oxford, 2015; *ibidem.*, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, in *Journal of Law and Society*, 45, 4, 2018, pp. 617-45.

[36] **R. SANDBERG**, *Rethinking Law,* cit., pp. 97-101.

[37] **R. SANDBERG**, *Rethinking Law,* cit., p. 107 (discussing the benefits of applying a gender studies perspective to law and religion and noting: "[A] feminist approach emphasizes that 'law is not an impartial arbiter.'" Despite placing this statement in his "law and gender" chapter, Sandberg is aware that the word "gender" is not synonymous with "woman" or "feminist". As he notes, "feminist scholarship has become a neutral term referring to a specialized field—the study of gender [...] because the gender bias of law (and all social institutions) was first explored by feminists". *Ibidem.*, pp. 108-9 (quoting: R. AUCHMUTY (ed), *Great Debates in Law and Gender,* Palgrave, Camden, 2018, pp. xi, and xiv.

[38] **R. SANDBERG**, *Rethinking Law,* cit., pp. 117 and 121.

The vantage point of applying a gender and critical race theory lens to law and religion permits, in essence, to treat religion as a construction or signifier indistinguishable from other categories of inequality, shifting the focus on power asymmetries as their common denominator. This emphasis on power, in turn, helps provide much greater insight into how, just as religion can shape the law, the law itself can shape religion - sometimes with interpretations that contrast significantly with those developed by believers. The way some Western states have reconstructed the Muslim woman as a secular, modern, and unveiled citizen symbolising "freedom," for instance, might differ greatly from the sensitivities and subjective experiences of veiled and pious traditional Muslim women both within and outside the West[39].

In sum, placing the study of law and religion under the canopy of gender and critical race theory uncovers how laws and religions function as discursive sites which, returning to Witte's ideas, "relate dialectically"[40], continuously constructing and reconstructing one another on their own terms. Viewed this way, the frameworks of law and gender and race encapsulate the idea that law and religion should be studied both in its legal and religious dimensions - the latter being the site where the subjective experiences and values of believers interact with (and eventually counteract) the mechanisms of the legal status quo. The "religious dimension of the law" thus represents a methodological supplement that can revitalise law and religion by balancing and enriching its institutional processes with insights over the socio -political narratives upon which the field has been built.

Against this background, Sandberg's prescription to regenerate law and religion is interdisciplinarity[41]: scholars must move beyond the mere study of the internal workings of state law and relate them to the broader cultural, political, social and economic context in which they have developed.

In the remaining chapters eleven, twelve and thirteen of *Reappraisal* Sandberg draws similar lessons also from the humanities, with a particular focus on socio-legal history and geography. In these contexts, his digressions into how the relationship between laws, boundaries, territories and history are formed are particularly revealing of how these interactions involve political negotiations of spaces and historical narratives[42]. This analysis reinforces Sandberg's findings from

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[39] For insights on this point from a post-colonial perspective see: **S. ABBAS**, *At Freedom's Limit. Islam and The Postcolonial Predicament*, Fordham University Press, New York, 2014.

[40] **J. WITTE**, *The Study*, cit., p. *327*.

[41] **R. SANDBERG**, *Rethinking Law*, cit., p.148.

[42] **R. SANDBERG**, *Rethinking Law,* cit., pp. 140 and 146 (where the Author distinguishes between an "old" approach to legal history and a "new" socio-legal approach to the field. While the former studies legal ideas purely from a doctrinal, intellectual perspective that reflects the inward-looking nature of current law and religion, the latter examines the genesis of legal ideas in relation to their social, political, and economic contexts to question whether they withstand the challenges of

the comparison of law of gender and critical race theory with law and religion - namely, that the interaction between the religious and the legal is similarly and inherently political.

In light of this, Sandberg's *Reappraisal* is a call on law and religion scholars to put on interdisciplinary glasses to better explore the wider social, cultural, political, and economic process at play in their home-field. Only by doing so they can break down the separate silos of "law" and "religion", transcending them as they prepare for regenerating the foundations of law and religion.

4 - Regeneration

Regeneration - this is the word Sandberg chose to title the last part of his book, where he explores how an interdisciplinary approach combining law and religion with social system theory could address and remedy the excessive legalism that has affected his home-field. Drawing on the works of Niklas Luhmann, the first three sections of *Regeneration* introduce the German sociologist's theory of social systems and its basic principles (chapters fourteen and fifteen), to then apply them to religions and to the study of law and religion (chapter fifteen and sixteen)[43].

Following the school of thought inaugurated by Talcott Parsons in the early twentieth century, Sandberg begins by explaining how Luhmann viewed society as akin to human body, composed of a multiplicity of institutions that, like body parts, discharge different functions to ensure social equilibrium. For Luhmann, institutions such as families, enterprises, politics, laws and religions are separate, distinct and autonomous systems that nonetheless work in tandem to guarantee the proper functioning of society as a whole[44].

While Luhmann's framework presupposes "social differentiation" between systems[45], the sociologist however acknowledged that at times some systems might take on functions belonging to others, generating overlaps that result in "de-differentiation"[46]. According to Luhmann, overlaps between functions occur because social systems are "operationally close, but cognitively

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modernity). As to the politics that are implicated in law and geography see: *ibidem*., 156 (discussing of this field provides the basis for a fuller and richer account of how the "the fusion of the legal and the spatial is political") (quoting: **N. BROMLEY**, *Law, Space and Geographies of Power*, Guilford Press, New York 1994) p. 5.

[43] For these chapters, Sandberg largely relied on Luhmann's work in: **N. LUHMANN**, *A Systems Theory of Religion*, Stanford University Press, Redwood City, 2013.

[44] **R. SANDBERG**, *Rethinking Law,* cit., p. 168.

[45] **R. SANDBERG**, *Rethinking Law,* cit., p. 166.

[46] **R. SANDBERG**, *Rethinking Law,* cit., p. 178.

open"[47], meaning that despite their attempts at differentiation, they constantly need to "communicate"[48] with other systems to thrive and survive. The information received from surrounding environments is then "transformed or re-constructed"[49] by each social system, which metabolises and repurposes it in line with its original functions. All in all, this is how systems grow in size, evolve, and, consequently, begin discharging functions that have traditionally been the domain of others.

Exploring this further in relation to law and religion, Sandberg moves on to considering how the same process occurs with faith-based tribunals, schools and charity organisations. For the Author, these entities exemplify how some religions navigate their interaction with modernity by intercepting external information about the mechanism of secular civil laws - in this case, in the areas of conflict resolution, education, and voluntary work - and then reproducing these within their own religious structures[50].

In integrating new legal functions within their faith-based systems, the point to be gleaned here is that religions, in essence, repurpose and reconstruct secular laws on their own terms. However, this is also true of the secular legal system, Sandberg continues, which similarly reconstructs religion on its own terms in response to faith-based groups entering modernity, the public sphere and, relatedly, the domain of the law. In system theory's language, the presence of faith-based systems in the public sphere essentially "offends social differentiation". It represents an "attack to law's autonomy"[51] that prompts state's actions to reconstruct religion and simplify religious beliefs into "something that law can understand and control"[52].

The advent of international and regional human rights frameworks is a clear example of how the law can recast religion in legal terms, reconstructing it as a right - such as Article 9 ECHR- and subsequently subjecting it to varying degrees of control by courts and states[53]. To come full circle, this legal way to represent religion harkens back to Sandberg's previous analyses in *Repentance* over legal "paper tigers" and the "growth of an academic industry that regarded the

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[47] **R. SANDBERG**, *Rethinking Law,* cit., p. 172 (quoting: **R. NOBLES** and **D. SCHIFF**, *Introduction,* in **N. LUHMANN**, *Law as a Social System,* Oxford University Press, Oxford, 2004, p. 8).

[48] For more recent and specific research that draws on system theory to study religion as a means of communication see: **E. PACE**, *Religion as Communication. God's Talk*, Routledge, London, 2011.

[49] **R. SANDBERG**, *Rethinking Law,* cit., p. 172 (quoting: **M. KING**, *The Truth About "Autopoiesis"*, in *Journal of Law and Society*, 20, 1993, p. 218.

[50] **R. SANDBERG**, *Rethinking Law,* cit., p. 180 (discussing social system theory in relation to "internal secularisation" as a process whereby some religions adopt to modernity by incorporating "the codes of other social systems to themselves and their operations" (quoting: **M. KING**, *The Muslim Identity in a Secular World*, in M. KING (ed), *God's Law Versus State Law*, Grey Seal, London, 1995, pp. 91, 97 and 105.

[51] **R. SANDBERG**, *Rethinking*, cit., p. 230.

[52] **R. SANDBERG**, *Rethinking Law,* cit., pp. 178 and 179.

[53] **R. SANDBERG**, *Rethinking Law,* cit., pp. 183-184.

manifestation of religion and the accommodation of religious differences as a problem to be solved through law"[54].

System theory, in sum, amplifies Sandberg's recurring plea for change throughout his book: law and religion studies are too legalistic and overly-focused on how state law understands religion rather on how religion understands state law, and how both "law" and "religion" understands each other. This is why, in the Author's view, this current state of affairs needs reform. In this connection, an investigation into how a system theory approach could help deconstruct the state-centric assumptions that brake law and religion studies and lay the seeds for its revival is provided in the final three chapters of *Regeneration*.

To that end, in chapter seventeen Sandberg begins by explaining how the operation of faith-based courts, schools, charities or any other legal function discharged by religions in the public sphere should be seen "as evidence of re-differentiation"[55], and not de-differentiation. As Luhmann himself pointed out, social systems perpetuate themselves in time and space by generating sub-social systems within their own structures[56]. Expanding on this argument, for Sandberg this means that religious legal orders themselves represent a sub-species of the broader system of law. Similarly to states and their legal offshoots, the Author continues, religious institutions operate according to codes of conduct and social control that, despite their non-governmental nature, possess an inherently normative character. Viewed this way, the legal operations of religions in the civil sphere should be regarded not as a *violation* of social differentiation - as conventional system theory would suggest - but rather as a *variation* of the principle[57].

At this point, Sandberg's expansion of Luhmann's theory allows him to achieve two intermediate objectives. First, a revised systems theory approach enables the Author to better unpack how religious systems present analogies with civil legal systems, and how this parallelism has the potential to extend law and religious studies beyond the mere confines of a state-centric legalistic view[58]. In this way, systems theory further supports Sandberg's claim in *Reappraisal* that an interdisciplinary approach is key to a more well-rounded development of the academic field of law and religion. Second, Sandberg's emphasis on the growing legal relevance (and, for some, the problematic nature) of religion in the public sphere allows the Author to further revisit conventional system theory.

Pointing to systems that blend religious and legal functions, in chapter eighteen Sandberg describes faith-based tribunals, schools and charities as counterexamples to Luhmann's prediction that orderly social differentiation between religious and legal system is the inevitable result

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[54] **R. SANDBERG**, *Rethinking Law,* cit., p. 182.
[55] **R. SANDBERG**, *Rethinking Law,* cit., p. 194.
[56] **R. SANDBERG**, *Rethinking Law,* cit. (quoting: **N. LUHMANN**, *Law,* cit., p. 467).
[57] **R. SANDBERG**, *Rethinking Law,* cit., pp. 189-195.
[58] **R. SANDBERG**, *Rethinking Law,* cit..

of secularisation processes[59]. On the contrary, Sandberg sees the fusion of the religious and the legal as an indication of the disordered "entropic complexity"[60] of society and the law as a whole. Extending this mindset within the field of law and religion, concludes the Author, would encourage scholars to critically re-examine the conventional narratives of secular progress and linearity that have long been underpinning the dominant state-centric approach to the discipline.

A thumbnail sketch of this critical approach in action is ultimately presented in the last chapter of *Regeneration*, where Sandberg attempts to de-construct the historical narratives surrounding the interaction between religion, marriage and education law in England and Wales. Contrary to the conventional wisdom - holding that these areas have gradually accepted secularisation and social differentiation between state and religions - Sandberg discusses how marriage and education laws, in truth, still bear the monopolistic imprint of a Christian influence that continues to reinforce the legal powers of the established Church of England[61]. All in all, the perceived secularisation of legislation in these areas has been often contextualised within a narrative of state-centred secular progress which assumes the decline of religion as a given, Sandberg explains. To the Author, this view requires a system upgrade that gives due recognition to the growing role an and influence of faith-based subjects in displacing linear and rigid models of social differentiation between law and religions[62]. By replacing "equilibrium with chaos, evolution with entropy, progress with inequalities"[63] Sandberg revisitation of marriage and education law's storylines not only conjures a different reality, but also becomes an opportunity to better expose the paradox at the heart of the law as a whole social system.

While the law is often presented as a linear and coherent system of rules, in reality, Sandberg recalls, its very mechanisms are informed upon the values, culture, and biases of the very people who create it, thus making the law (including marriage and education laws) arbitrary and unpredictable[64]. Only by acknowledging this and recognising how the chaotic concoction between the religious and the legal is now reaching its most furious pitch - in the UK and beyond - can law and religion finally accept entropy and choose change.

5 - Discussion

[59] **R. SANDBERG**, *Rethinking Law,* cit., pp. 196-206. On Lhumann's thoughts over secularisation and social differentiation: **N. LUHMANN**, *A Systems Theory of Religion*, Stanford University Press, 2013 (arguing that: "secularization has to be associated with functional differentiation as a modern form of differentiating the societal system.")

[60] **R. SANDBERG**, *Rethinking Law,* cit., p. 201.

[61] **R. SANDBERG**, *Rethinking Law,* cit., pp. 212-222.

[62] **R. SANDBERG**, *Rethinking Law,* cit..

[63] **R. SANDBERG**, *Rethinking Law,* cit.,p. 202.

[64] **R. SANDBERG**, *Rethinking Law,* cit., pp. 177 and 205.

"The world today […] is as furiously religious as it ever was, and in some places more so than ever"[65]. Thus wrote American sociologist Peter Berger in 1999, recanting his earlier views on the so-called "secularisation theory"[66] that he had staunchly supported in the 1950s and 1960s. While historians and social scientists of Berger's generation employed this formula to label the loose proposition that religion was inevitably declining in the modern world, "powerful movements of counter-secularization"[67] were now turning the theory on its head. Importantly, one major and now widely accepted observation that prompted Berger to reconsider his position was that "secularization on the societal level is not necessarily linked to secularization on the level of individual consciousness"[68].

Outside sociological circles, developments within the American legal academy of the mid-70s were simultaneously creating the conditions to support Berger's new "de-secularisation theory". The scholarly work of Harold J. Berman[69] in particular - the intellectual father of John Witte, whom Sandberg frequently references in *Rethinking Law and Religion* - was at the forefront against the belief that religion had become irrelevant in American life. On the contrary, with his pioneering book *The Interaction of Law and Religion*[70] Berman offered a revealing testimony to the continuous presence of religion in the human (and legal) mind.

All in all, Berman's book is still applauded today in the US as the first "anchor text"[71] that brought insights into how legal and religious ideas share many foundational elements that resist separation. In Berman's words, religion offers legal structures a sense of transcendence, common good, and purpose without which the law degenerates into a mere, utilitarian "legal mechanism." Meanwhile, law provides religious structures with a sense of justice and order without which religion "loses its social effectiveness"[72].

With this focus on the dialectical interaction between the "religious dimension of law" and the "legal dimension of religion", this is how Berman - then followed by his student and later colleague John Witte - begun to challenge the long tradition of "religion-state

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[65] See: P.L. BERGER (ed), *The Desecularization of the World. Resurgent Religion and World Politics*, William B. Eerdmans Publishing Co., Michigan, 1999, p. 2.

[66] This theory is developed in: **P.L. BERGER**, *The Sacred Canopy. Elements of a Sociological Theory of Religion*, Doubleday, New York, 1967.

[67] P.L. BERGER (ed), *The Desecularization*, cit., p. 3.

[68] P.L. BERGER (ed), *The Desecularization*, cit.

[69] Regarded globally as the father of modern law and religion studies, Harold J. Berman himself brought Witte to the Center for the Study of Law and Religion (CSLR) at Emory University, where Witte currently serves as the director. For more information on the history of the CSLR see: <https://cslr.law.emory.edu/about/index.html> (accessed 10 September 2024).

[70] **H.J. BERMAN,** *The Interaction of Law and Religion*, Abingdon Press, Nashville,1974).

[71] This term could be traced back to: **J. WITTE**, *The Study*, cit., p. 328 (fn 2).

[72] **H.J. BERMAN**, *The Interaction*, cit., p. 1.

separation"[73] that dominates the American scene.

It is precisely this intellectual enterprise against the status quo that is as much celebrated by Sandberg in the UK as it is in the US by American Professor Marc. O De Girolami. In the essay T*he Death and New Life of Law and Religion*[74], in particular, the latter briefly expands upon the relevance of Berman and Witte's activism for the field of law and religion. Reflecting on the intellectual contributions of these scholars, De Girolami observes how they represent "a critical reaction to the deconstruction of the American Christian legal heritage proceeding apace in the courts and the academy […] via serial applications of the doctrine of separationism"[75]. With these words, the Author explains how Berman and Witte feared that legal responses to religious pluralism in the US - through a model of religion-state separation that combines free exercise for all religions with disestablishment of state denominations[76] - would over time destabilise and discard the Christian foundations of American law and society. For Berman and Witte, theorising the "religious dimension of the law" was thus the overriding baseline for combating the ideological relativism that religion-state separatism would inevitably produce[77].

From De Girolami's vantage point, it now becomes clear how Berman and Witte are concerned with the reconstruction of law and religion in the US as much as Sandberg is in the UK -- albeit from diametrically opposed viewpoints. To see how, it is helpful to compare the respective approaches of these scholars.

As seen in the final part of *Rethinking Law and Religion*, Sandberg's critique of the Church of England's *increasing* legal powers relied, in fact, on the very "religious dimension of the law" that Berman and Witte elaborated to problematise, in contrast, the *diminishing* political hold of Christian heritage in the American polity. Personal sensitivities aside, these diverging applications of the theory can be explained also by the

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[73] Since the First Amendment to the US Constitution speaks of the free exercise of "religion" and disestablishment of "religion", this paper employs the formula "religion-state" instead of "church-state" relationship. This approach is also preferred in American legal textbooks. See for instance: **W.C. DURHAM** and **B.G. SCHARFFS**, *Law and Religion: National, International and Comparative Perspectives*, Wolters Kluwer, New York, pp. 121. The formula"religion-state" also better conceptualises separation as a particular secularist intellectual position in America promoting the notion of law as an independent discipline, distinct from religion generally and Christianity in particular. For a discussion on this theme: **M.O. DE. GIROLAMI,** *The Two Separations*, in M.D. BREIDENBACH and O. ANDERSON (ed), *The Cambridge Companion to the First Amendment and Religious Liberty*, Cambridge University Press, Cambridge, 2020, pp. 396-427.

[74] **M.O. DE GIROLAMI**, *The Death,* cit.

[75] **M.O. DE GIROLAMI**, *The Death*, cit., p. 6.

[76] See: **AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AMENDMENT I**, (stating that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof") <*https://constitution.congress.gov/constitution/amendment-1/*> accessed 24 September 2024.

[77] **M.O. DE GIROLAMI**, *The Death,* Cit., p. 7 (describing Berman and Witte as "contra-strict separatism" scholars).

distinct types of religion-state models in which the three scholars have operated, and, relatedly, the different conventional assumptions that they have attempted to challenge.

For Sandberg, the mainstream narrative to dispel is the idea that the interrelation of church and state in the UK has led, over time, to increased state control and diminished religious influence in the hands of the established Church of England, particularly in the civil spheres of marriage and education. In this context, focusing on the "religious dimension of the law" becomes key to questioning the often-taken-for-granted traces of religious privilege in the UK model of established churches. In contrast to Sandberg's critique of legal *establishments* of religion in the UK, Berman and Witte instead direct their criticism towards legal *separatism* from religion in the US. Here, the "religious dimension of the law" serves as a methodological lens to illuminate how the allure of separatism - in pursuit of unfettered ideological pluralism and disestablishment - is contributing to the erosion of the Christian bonds of American society.

For all their divergent perspectives, the three scholars appear however to agree on one point: the need for deeper insight into how religions - whether in the form of faith-based monopolies or pluralities - shape and influence legal mechanisms.

With this in mind, in *The Death and New Life of Law and Religion*, De Girolami, finally adds further nuance and strength to this proposition by looking at the effects that the changing nature of religion in America is producing within the law. Expanding Sandberg's focus on critical movements in *Reappraisal* to include new creedal forms of belief and resistance in the US, De Girolami thus explores how "the religious dimension of the law" is both exposing entrenched obsolescences in law and religion while simultaneously breathing new life into the field. This is discussed in the following section.

6 - Death and New Life

Law and religion today live in a very different world from the one in which it came into being. This is because law and religion is a product of globalisation - an intellectual response to the increasing coexistence of religious (and other) pluralities driven by the unruly circulation of goods, capital, services, people (and faiths) around an ever-changing globe[78].

From this perspective, De Girolami recalls that the primary objective of the first wave of late-twentieth-century American law and religion scholars "was to conceive a liberal theory of religious freedom" for a "disunited and fragmented polity"[79] that was becoming more and

[78] For an early exploration of law and religion in market terms within Italian academia see: **M. VENTURA**, *La Laicità dell'Unione Europea. Diritti, Mercato e Religione*, Giappichelli, Torino, 2001.

[79] **M.O. DE GIROLAMI**, *The Death*., cit., p. 8.

more divorced from traditional Christianity.

Looking back at past mistakes and obsolescences is the first step to project law and religion into the future. To that end, De Girolami contends that this early project's major mistake was to treat religion not "as a substantive system of common belief and practice"[80] but rather as a private matter to be articulated in purely legal terms[81]. Echoing Sandberg's analysis in *Repetance*, concerns here are directed towards a legalistic and state-centred approach that regards religion, its manifestations and need for accommodation as a problem to be solved through the law. Flattening religion to a mere legal issue, cautions De Girolami, will open the door for increasing comparisons between religious claims and other ideological stances deemed to have a sufficiently cogent character in court. On this point, the Author details how, under the judicial application of the Free Exercise Clause to the US Constitution, religion has been diluted into an individualistic matter of "sincerely-held beliefs", now indistinguishable from any other ideological or political claim[82]. So conceived, the liberal religious freedom experiment - with its promise of supreme individual autonomy from embedded cultures, places and bonds - has sloughed off religion from its substantial and historical distinctiveness[83], thus decreeing its "death"[84].

According to De Girolami, this "death" of religion at the hands of its legal custodians is now creating profound alterations throughout the whole system of law and religion, generating three specific obsolescences.

First, the possibility to fill the legal category "religion" with almost any ideological vagaries of consumer society suggests that mainstream debates over the legal meaning and distinction between "the religious" and "the secular" have become utterly irrelevant today[85].

Second, equally dead and obsolete are debates over the so-called principle of "state neutrality concerning religions" and the public-private divide[86]. For if religion can be "nothing and everything, then it is impossible for the government to be neutral towards it"[87]. Relatedly, another indication of the "death" of neutrality and the public-private distinction is that, just as the law has dissolved religion into a matter of

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[80] **M.O. DE GIROLAMI**, *The Death.*, cit., p.10.

[81] **M.O. DE GIROLAMI**, *The Death.*, cit. (arguing that: [t]he American state no longer looked upon religion as a source of common strength (…) but instead as a peculiar problem affecting peculiarly problematic people to be managed and controlled.")

[82] **M.O. DE GIROLAMI**, *The Death.*, cit., p. 10 (fn 56) (citing *Thomas v Rev Bd 450 US 707, 714* (1981) and *Frazee v Illinois Dept of Employment Security* 489 US 829, 832–33 (1989) as the initial American cases establishing that believers qualify as religious if they hold a sincere belief, irrespective of the official orthodoxies of their affiliated group.

[83] The detachment of religion from history and culture is what political scientist Olivier Roy describes as "deculturation of religion". See **O. ROY**, *The Crisis of Culture. Identity Politics and the Death of Norms*, Oxford University Press, Oxford, 2024, p. 136.

[84] **M.O. DE GIROLAMI**, *The Death.*, cit., pp. 10-13.

[85] **M.O. DE GIROLAMI**, *The Death.*, cit..

[86] **M.O. DE GIROLAMI**, *The Death.*, cit., pp. 13-17.

[87] **M.O. DE GIROLAMI**, *The Death.*, cit., p. 12.

individual and changing preference, now also these concepts share the same dependence on whimsical personal choice.

In Europe, one telling example of the law's solvent effect was recently offered by the Court of Justice of the European Union (CJEU). Absent a unanimous European consensus over the legal meaning of "religious neutrality", since 2017, the CJEU has enlisted the assistance of self-proclaimed "neutral" business actors to develop a definition of this concept in private employment[88]. Strikingly, this *private sector* interpretation of neutrality was ultimately extended to the regulation of employer-employees relations in the Belgian *public secto*r in the Court's 2023 judgment in *OP v Commune D'Ans*[89]. With these moves, the CJEU not only elaborated a definition of "religious neutrality" based on the self-interested priorities of capitalistic entrepreneurs, but also promoted *private*, market-style competition as an alternative logic and mode of regulation of religions within *public* environments[90]. Without belabouring the details of these developments, the point to be gleaned here is that, as in the US, these European developments convey a growing sense of interchangeability between the "public" and the "private" and the "neutral" and the "non-neutral". If it is true that all these categories have now become volatile signifiers that can be easily repackaged depending on their users' cultural and material contexts, then there is reason to believe that these very concepts might become increasingly vulnerable to future arbitrary applications.

For De Girolami, this point, in turn, speaks to a third and final obsolescence in contemporary law and religion: debates over the limits and permissibility of religious exemptions[91]. Obviously, this is not to say that academics and legal professionals should stop wrangling over scattered issues on religious free exercise and conscientious objections against state laws. However for De Girolami, focusing solely on the legal technicalities of these disputes misses a crucial opportunity for the field to develop, as it fails to establish connections between the particular and the universal[92].

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[88] See the combined effects of the CJEU decisions in: Case C-157/15, *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV* [2017] EU:C:2017:203; Case C-188/15, *Asma Bougnaoui, Association de Defense des Droits de l!Homme (ADDH) v Micropole Univers SA,* [2017] EU:C:2017:204; Joined Cases C-804/18, *IX v WABE e.V* and C-341/19 *MH Müller Handels GmbH v MJ*, [2021] ECLI:EU:C:2021:594; Case C-344/20. n.d. *LF v. SCRL* [2022] EU:C:2022:774. For a recent discussion on the role of private market actors in crafting neutrality at the CJEU level: **S. SMET**, *The Impossibility of Neutrality? How Courts Engage with the Neutrality Argument* in *Oxford Journal of Law and Religion*, 2022, 00, pp. 8-14.

[89] Case C-148/22, *OP v. Commune D'Ans* [2023] EU:C:2023:924.

[90] See: **A. LICASTRO,** *Principio Europeo di non Discriminazione Religiosa e Approcci Nazionali alla Neutralità del Pubblico Dipendente*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 2023, 12,1, pp. 50-52 (detailing what the Author dubs the "privatisation" of the dispute by the CJEU's Advocate General).

[91] **M.O. DE GIROLAMI**, *The Death*., cit., pp. 17-21.

[92] **M.O. DE GIROLAMI**, *The Death*., cit. See also. **M.O.DE GIROLAMI**, *The New Disestablishments*, in *Civil Rights Law Journa*l, 33, 1, 2022, p. 33 (arguing that: "the

In a new consumeristic and fragmented universe, new re-conceptualisations and invocations of "religion" to frame objections that apparently have little in common with religion as such will become standard practice. Hence, inquires on whether or not particular conscience claims should be deemed "religious" in conventional legal terms will become a myopic distraction from a shifting social reality that increasingly implicates religion in new ways. From QAnon-like conspiracy theorists to "woke "social-justice movements and anti-modern traditionalists, what is needed instead is greater attention to strategic deployments of "religion" to create, defend or oppose alternative establishments emerging from the ashes of the Christian Western tradition.

In this way, De Girolami's analysis in the US of "new political establishments" reacting to tradition and "new disestablishments" counter-reacting to modernity complements Sandberg's analysis in the UK on the need to situate the study of law and religion within critical movements literature - such law and gender and critical race theory. Confronting the status quo, this is how De Girolami and Sandberg point to the study of dissent as the new path to flash law and religion forward into the future.

7 - Conclusions

In the essential volume *Law and Revolution. The Formation of the Western Legal Tradition,* Hardold J. Berman argued that: "To speak of the Western legal tradition is to postulate a concept of law, not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values and ways of thought"[93].

Standing on the shoulders of the giants, with their latest releases Sandberg and De Girolami hold up an alternative - an higher ideal of law and religion as a dynamic process that studies and adapts to the constantly shifting world around it. Categories that once allowed the drawing of distinctions today are no longer self-evident. Only an act of "creative destruction" to liberate "law" and "religion" from their entrenched old postulates could propel law and religion as a field in its own right forward into the future.

question of the conceptual boundary lines of religion-of determining what is "in" and "out" legally speaking-is increasingly anachronistic.")

[93] **H.J. BERMAN**, *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Massachusetts, 1983, p. 11.