Sociologia

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Andrea Bixio

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Rivista quadrimestrale di Scienze Storiche e Sociali

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Anthony Blasi, Olga Breskaya, Giuseppe Giordan

Religious Freedom and Microsociology of Law: Thinking with Georges Gurvitch

Abstract – The article focuses primarily on the levels of socio-legal analysis of religious freedom, applying Georges Gurvitch's microsociology of law approach. By doing that, the authors examine the concepts of levels in depth of law, types of social milieu, and types of freedom in a way that they can be applied in the analysis of religious freedom. Several cases concerning religious freedom that depict various levels in depth are examined to illustrate Gurvitch's thesis that a sociological focus on intuitive and spontaneous experiences of religious freedom is highly important. The authors conclude that Gurvitch's dialectical method allows for an expansion of the analysis of normativity in sociology and has special implications for legislating and interpreting legal provisions.

1. *Introduction. Legal theory of religious freedom and its challenges*

During the last decades, many comments have been made regarding the lack of cooperation between sociology and human rights scholarship in general and with specific rights in particular (Morgan, Turner 2009; Hynes, Lamb, Short, Waites 2011; Frezzo 2015). It is also part of that history that any sociological engagement on the topic required scientific attempts and time to locate "sociality" in analysis of human rights. Sociological predispositions, maintaining a distance from normative concerns (Breskaya, Giordan, Richardson 2018), and parallel research in political science with a broad application of empirical methods in human rights analysis (Landman 2009) left room for a sociological conceptualization of specific freedoms and rights. The sociology of religious freedom, as introduced by James T. Richardson (2006), is among these new sub-disciplines which emphasize legal and social dimensions of religious freedom and looks for a balance between them. Meanwhile, religious freedom has been theorized by sociologists (Finke, Stark 1992; Richardson 2006, 2007, 2011; Grim, Finke 2011; Berger 2014); however, wide application of classical sociological theories to religious freedom analysis is still awaiting its turn.

The best way to understand why sociology has to be engaged in human rights analysis is to start with related challenges of modern legal theory on one specific right. Religious freedom as one of the oldest rights and "most controversial of the claims" (**Evans 1997**) is taken as an example in this research. Legal theory of religious freedom, as introduced by Carolyn Evans (2001), highlights the gap between the neat legal formulations and definitional and interpretational frameworks that retain axiological meanings. She argued that general agreement among the states with the international standards of religious freedom and lack of any univocal interpretation or value system behind it challenge religious freedom theory. With reference to human rights treaties and particular legal cases, Evans emphasized that "little guidance as to the reasoning behind this decision or any detailed explanation of what the freedom entailed" (Evans 2001: 18) is provided. Even if states incorporate the principle of freedom of religion or belief in a constitution or in other legal regulations, there is no single system of reasoning which provides "a sophisticated conception of the rationale for freedom of religion or belief" (Evans 2001: 18).

In their search for relevant reasoning, legal scholars and practitioners look for the existing cases, national models of secularism, and Church-state relations. Legal knowledge of key principles and relevant latest precedents in religious freedom case law[1] allow one to deal with legal conflicts in religious freedom jurisprudence. However, in the hierarchy and variety of legal mechanisms there is still room for a doubt. As Evans has shown in the example of the *Kokkinakis v. Greece* case in the European Court of Human Rights, the interpretational framework considers individual and state levels of religious freedom practice (Evans 2008). While Judge Martens emphasized that the state had to "leave contestation on matters of religion to religious believers" (Evans 2008: 299), the opposite position of Judge Valticos was to allow the state to interfere in the case of proselytizing activities. In this case, who can decide about the distinction between "between bearing Christian witness and improper proselytism"[2]? This question could be approached with theological, legal, or socio-political arguments. It refers either to the individual level of practicing religious freedom or the argument about the obligation of the state to protect religious freedom to address the problem of how the legal facts of religious freedom violations can be considered. Who has the authority to intervene in the situation of conflicting interests of individuals and make decision about the way they freely express their religious views in everyday context?

[1] Guide to Article 9 by European Court of Human Rights (2019) summarizes, updates, and classifies relevant cases.
[2] See Kokkinakis v Greece, judgment of 25 May 1993, Series A no. 260-A, 17 EHRR 397, para 48-49.

These challenges allow translating the legal provisions taken purely in a legal vein into sociological analyses. They put forward the necessity of determining the social factors assisting in interpreting religious freedoms and designating what will be called levels of religious freedom and social jurisprudence outside of court decisions and state regulations. What is meant by levels was clarified by the twentieth century sociologist Georges Gurvitch, who contributed sociological arguments for legal interpretations and relationships between positive and social laws.

2. *Georges Gurvitch and microsociology of law*

For a sociological response to the inquiry arising from theory of religious freedom as stated by Evans, we apply the doctrine of microsociology of law of Georges Gurvitch (1894-1965). A French sociologist of Russian origin, he developed the ideas of legal sociology working together with his teacher in Saint Petersburg University. It was Professor Léon Petrazycki who developed the ideas of official and intuitive law, where the former is sanctioned by the state and the latter has a dynamic nature dependent on socio-cultural changes. This distinction had a particular influence on the sociological ideas of Gurvitch. The formalism of prerevolutionary Russian legal tradition was not favored by Gurvitch (Antonov 2016), and he was searching for answers how legal determinism can be considered with an intuitive and spontaneous nature of law. Gurvitch brought together many ideas of French, German, and Russian traditions of legal and social thought into his microsociological approach; however, "he never stopped thinking and working on some of the great central problems of Russian philosophy" (Antonov 2016: 506 - our translation).

Another important context of the Gurvitchian theory of social law is that he developed his ideas before the Universal Declaration of Human Rights was adopted in 1948, thus anticipating the discussions about legal universality and moral justifications of human rights. However, he developed together with his concept of social law, ideas about social rights and a dual nature of law – its rootedness in the realm of norms and values. His main task was to understand the interaction of social and normative orders in the way they produce "normative facts" and systems of meaning at the various layers of society and also independently from the state. Typologies of "kinds of law, frameworks of law, and systems of law" (Gurvitch 1946a: 156) were important for his sociology, together with the differentiation of types of *active sociality* corresponding to forms of production of *normative facts*. He identified three forms of sociality in his sociology of law – *masses, community, and communion* – depending on the degree of intensity of binding norms for each type.

The weakest, least stable and least social in this triad is a social law of *masses* since this social milieu is weaker in its prescriptive normativity and less able to produce its own normativity over time. *Communion* in this typology is more bound to religious and moral principles than with jural norms; it occupies middle position between *masses* and *community* in its capability to produce and support social law. According to Gurvitch, "the community represents generally a sociality most favourable to the generation of law, since it is there that jural beliefs have a tendency to be differentiated from moral beliefs and mystical ecstasy (religious and magical), such as often predominate in the communion" (1946a: 169) and it is characterized by stable social links, because it arises from multiple sectors of society, with a contract-like obligation. An important development in this integrative system of social and normative orders is the attention to the concept of rights, which Gurvitch called "'subjective' social rights". His main works on sociology of law were published in 1932, 1935, and 1937[3]; he did not yet apply concepts of civil-political and socioeconomic rights; however, he later wrote two works, "La déclaration des droits sociaux" (1944) and "The Bill of Social Rights" (1946b), arguing that social rights have to be part of New Bill of Rights. From "complete denial of "subjective rights" in the mass, he saw community as "a *milieu* particularly favourable to an equilibrium between "objective" social law and "subjective" social rights" (1946a: 169).

Gurvitch's microsociology of law has six levels of depths which can be found in every kind of social and individual law: 1) organized law fixed in advance, 2) flexible organized law, 3) organized intuitive law, 4) unorganized law fixed in advance, 5) flexible unorganized law, and 6) unorganized intuitive law. The differences between the six levels of depths were explained through the combinations of rigidity and spontaneity which are related to types of social structures and groups producing and practicing them. The plurality of the levels in depth is one of the central ideas of Gurvitch's microsociology of law. He suggested the multi-layer system of law, in which juridical life can be classified with 162 types of law attached to various social groupings and which he called "jural microcosm" (1946a: 181). It is the level of unorganized intuitive law which has "the deepest" dimension and is a primary legal reality.

Legal pluralism in his system is a result of a pluralism of normative facts and value systems produced by groups, which allows for the description of a jural typology of social reality. The empirical level of law with its intuitive and spontaneous character is balanced with the rigid and stable forms. Gurvitch's legal pluralism emphasized that there in no one

[3] See Gurvitch Georges, 1932, *L'idée du droit social,* Paris, Sirey; Gurvitch Georges, 1935, *L'Experience juridique et philosophie pluraliste du droit,* Paris, Pedone; Gurvitch Georges, 1937, *Essai d 'une classification pluraliste des formes de la sociabilité*, Paris, Alcan.

center of law-making, and legal conflicts and tensions demonstrate this in a best way. The equilibrium of legal levels produces the national legal system. Thus, when outlining his perspective of microsociology of law, Gurvitch wrote that this sub-discipline has two tasks, first "to study the kinds of law as functions of different forms of sociality", and second, "to study the kinds of law as functions of layers of depth which can be found within every form of sociality when it becomes normative fact" (1946a: 159).

The idea of social law, i.e. that every social group can have an autonomous built-in law, is central for Gurvitch's microsociology of law. Social law "can never be imposed from without. It can regulate only from within, in an immanent way. …[I]t is inherent in each particular "We", favourable to the jural autonomy of interested parties" (1946a: 167). The concept of social law taken together with the idea of legal pluralism can explain why particular legal acts of religious freedom are not accepted by society. As a recent Dutch case showed, the implementation of a 'burqa ban' in August of 2019 in the Netherlands "has been rendered largely unworkable on its first day in law after both the police and Dutch transport companies signalled an unwillingness to enforce it."[4] Additionally, the mayor of Amsterdam has expressed her dismay at the law and that the authorities of the city are going to ignore the new law. In the moment when social law depicts conflicts with an official policy[5], we observe that religious freedom being a human rights principle is experienced in the society as a value-driven norm retaining the importance of pluralism and freedom of religious expression in public space.

Gurvitch's concept of social law received critiques from the French scholarly and professional legal community of his time (García-Villegas 2018), since social law was questioning the state's legal sovereignty, even though in his concept of legal pluralism he clearly explained the hierarchy of legal norms and differentiated social law from the law of the State. What is important for the application of Gurvitch's ideas to modern processes of interpretation of legal cases – including cases on religious freedom – is that he saw a dialectic across social and normative levels in depth rather than a back-and-forth between two systems. He also explained that his ideas are important in the context of violations of norms and legal conflicts; however, his main concern was with the validity of interpretations of law. He explained that "simple interpretation and systematization of legislative texts and decisions of tribunals' are not sufficient" (Gurvitch 1946a: 7) because social law is not taken into account together with the legal codes.

> Legal rules may remain entirely impotent, that is to say, with no application whatsoever… If the jurist took no account of the living law, of the spontaneous law in action, of the flexible and dynamic law (which is in perpetual flux and obviously not detachable from the social reality of law), of the behaviour, practices, of the institutions, of the beliefs related to law, he would run the danger of constructing an edifice entirely disconnected from the law really valid, from the law really efficient in a given social milieu. (Gurvitch 1946a: 7)

Whereas the jural typology of social groups and classification of levels of law retain their theoretical importance, the practical application of Gurvitch's theory can be seen in his method of analyzing of normative facts. The possibility of discerning the levels in depth with the deeper and the more superficial levels of normative life allow sociologists of religious freedom to focus on the study of social groups and individuals in the process of their right-claiming. Practicing legal professionals can find it useful for interpretation – it suggests models of analysis of normative facts with its rootedness in the process of law-production at the layers of social reality.

3. On Gurvitch and the study of the freedom of religion

In a sense everyone knows what freedom of religion is, but putting it into a formulation is not easy. Freedom as such is not a simple idea. Human liberty, for both individuals and groups, "consists in a voluntary, spontaneous, and clear-sighted act" (Gurvitch 1996: 68 - our translation). Clearly, the more voluntary the action is, the freer it can be said to be; the more spontaneous, the freer; the more clear-sighted, the freer. Thus one can speak of types of freedom. Georges Gurvitch wrote of six types: a) freedom to follow subjective preferences, b) freedom of revitalizations, c) free choice, d) freedom of invention, e) freedom of decision, and f) freedom to create (1996: 70 - our translation). With regard to freedom of religion, there is, accordingly, a) the freedom to be religious or not, as one wishes, b) the freedom to resume one or more aspects of religions, c) the freedom to chose among religions, d) the freedom to invent new religious forms, e) the freedom to decide what religious freedoms there are, f) the freedom to create new religions and their contexts. In particular cases it is necessary to inquire what degree of freedom exists under a particular regime or in a particular group of society.

When studying freedom, Gurvitch was usually concerned with describing social realities that impinge upon human activity without misdepicting humans as

[4] The Guardian, 1 August 2019, "Dutch 'burqa ban' rendered largely unworkable on first day", Internet access: https://www.theguardian.com/world/2019/aug/01/dutch-police-signal-unwillingness-enforce-new-burqa-ban, accessed 10 February, 2020.

[5] Global News, 7 October 2019, by Mike Corder, "Dutch burqa ban has 'no place' in society: UN racism rapporteur", Internet access: https://globalnews.ca/news/6002251/un-criticizes-dutch-burqa-ban/, accessed 10 February, 2020.

passive recipients of forces external to them. He was not in most cases discussing the more or less normatively supported prerogatives of humans – human rights. Thus his discussion of social determinism and human liberty (Gurvitch 1963) is mostly concerned with the accurate portrayal of the social conditions in which people unavoidably live. Nevertheless, there is a topical continuity between his personal commitment to human liberty and his scientific account of social life. It would have made little sense for him to propose a "new bill of human rights," as he did prior to the publication of the Universal Declaration of Human Rights, if he thought humans were totally determined by their environing conditions or by their physiological psychologies anyway. Consequently we can explore the various aspects of life in societies as he saw them and how they can lead us to identify contingencies that can facilitate or hinder free human activity, particularly religious activity.

Gurvitch identified a core human experience within human consciousness itself, a center of spontaneity. In contrast to this experiential center would be an exterior world of physical objects. Following a basic phenomenological insight, he knew that there would be no object as object unless there were also a subject for whom the object would be an object. An only partially aware subject, as someone asleep and dreaming, may have shadows of objects entering consciousness and leaving the realm of awareness, but the subject is not aware of the material or even a logical constraint of objects as objects. Dreams are not constrained by objectivity and rationality. Between an interior pole of a wide-awake subject and an exterior pole of physical objects, Gurvitch described a series of levels in depth in which social phenomena could appear. The number of levels was indeterminate; it depended on the usefulness of identifying various levels in a given study. The levels could even overlap one another. A study of power, for example, would range from a subjective recognition of a person having power, a concept of perhaps a political boss, a cognition of an acquaintance who lost a job after angering a political boss, an image in mind of an informal organization that meets regularly at a restaurant, the sound of the name of the boss, and even the image of the well-paved roadway leading up to a modest house in which the boss lives. Such an array of objects, each one of which is dependent on not only one's own subjectivity but that of other people, correspond to what Gurvitch termed "levels in depth."

Applying this approach to religious freedom, we can begin with the surface morphological level. Some ancient cities were subdivided into quarters, each of which was inhabited by an ethnic group that engaged in one occupation, that was governed by its own legal traditions, and which adhered to its own religion with its unique festivals and observances. The physical attributes of life in a given quarter could serve as expressions of a communal identity. One's name may be that of the occupation. One's religion, as indicated by a figurine on a bracelet or an item of clothing, expressed one's social self. Whether one were free to participate in a festival of some other group in its quarter of the city depended on the character of the relationship between one's own community and that other community. If the two communities were on friendly terms, one might participate in the other group's ceremonies. If the inter-communal relationship were characterized by hostility, that would not be the case. In contemporary Northern Ireland, as a case in point, while occupations, legal traditions, and many other cultural lifeways may not correspond to religious identities, only the force of the modern State can keep the peace when one religious group marches into the "quarter," so to speak, of the other religious group for purposes of commemorating a battle that took place centuries ago. The surface aspect of religion can impinge on the freedom of religious expression in other ways. How a person dresses can become the subject of either unofficial social norms or official laws. Whether a church of historical significance can be modernized for worship purposes might be subject to a city ordinance. Whether a religious symbol could be located in a classroom of a publically funded school could be a legal matter. Whether a cemetery from centuries ago could be transformed into a museum can become the occasion of litigation.

Gurvitch also pointed to the organizational level in depth. Organizations typically have pre-established patterns of conduct that could be flexible but are often rigid. One thinks of the practice in American courts of swearing to tell the truth, the whole truth, and nothing but the truth. The law and its courts are secular, but the ritual, which has consequences in the secular law insofar as liability to accusations of perjury are concerned, has a religious dimension. The ritual could reflect a freedom of religion for some people, for others a violation of a religious prescription to be so truthful as not to need to be sworn in, and for others still a use of others' religious forms rather than one's own. Organized life often involves the commerce between individual and organizational claims; militaries, for example, send people into situations of risk of life and limb, not to mention killing and inflicting injury, yet are secular. What could be highly significant in religious terms for the individual would be an entirely secular matter for the organization. Consequently militaries often provide chaplains, who are officers of the military but agents not of the military but of the individuals' religious traditions. Apart from militaries, governments often seek legitimation from "religion in general" but not necessarily any particular religion. The Roman Empire did this by maintaining a pantheon; some modern governments do it with "civil religion." A result can be an etiquette of invocations embracing all but worshiping none, bringing the transcendent to mind but in a relatively disembodied manner. In invocations, the religious sentiment is freely elicited, but religion is not.

Gurvitch also points to the importance of a level of symbols, ideas, collective values, and of works of civilization in general. How much latitude do people in general have in displaying religious symbols, expressing religious ideas, sharing in religious values, and involving themselves in works of religious civilization? People may have religious icons or statues in their homes or in

marginal spots in their work places precisely because there are public territories and spaces where they cannot do so. They may have personal religious ideas that they do not express in religious places because the latter are the domain of clergy, who have officially approved religious ideas. They may value religion, refraining from displaying their own religious symbols precisely out of respect for other people's religion. Even if not religious themselves, people sometimes display art works having religious content out of an appreciation for the wider civilization. One thinks of the anticlerical conductor Arturo Toscanini championing the requiem mass of the anticlerical Giuseppe Verdi, a master work of nineteenth century music civilization. Somehow the secular context exerted no force over the religious sentiment intuited by the composer and recognized by the conductor.

There is a shared mentality, a mental life, that is involved in all these levels of social reality, but, according to Gurvitch, that does not mean that it cannot be studied itself, abstracted from the other levels. He thought of individual and interpersonal mental activity and culture as three "directions" of the whole realm of mental activity. As a phenomenon that is personal, interpersonal, and cultural (as well as organizational and physical), religion is locatable at this level of social reality. An individual's religiosity is not isolated from religiously-themed interactions with other people, nor unaffected by religiously-themed cultural environs. A person who has been socialized since childhood in an instrumental supernaturalism ("magic") may resist a shared rationalized scientific culture, or alternatively abandon a childhood religiosity and become over time non-religious or after some internal conflict more rationally religious. The same can be said of a body of intellectuals in a trajectory of theological thought over time, or of a general culture. In this light a scientific study of religion would be well advised to cease speaking of religion-in-general as if it were a phenomenon and speak instead of religious stances more integrated or less integrated with science and other aspects of a person's, a family's, a group's, or a society's subculture or culture and, Gurvitch would insist, their dynamics.

4. *Applications in the study of religious freedom*

We bring below several examples of how the application of Gurvitch's microsociology of law and freedom enrich our understanding of religious freedom. If we are interested in understanding what religious freedom is, we have to look at the spontaneous level of social law, for instance, taking into account the freedom to invent new religious forms and practices. One recent example can be illustrative in this regard. In October 2019, on the feast of the patron saint of the city, San Petronio, the archbishop of Bologna Matteo Maria Zuppi blessed the initiative to celebrate this event with a special food, which does not contain pork.[6] It was done to respect immigrants, mostly the Muslim community, in order to welcome all who live in the city to celebrate the holiday. The idea of excluding ham and mortadella and replacing them with halal meat implied the value of integration together with the possibility of preserving religious freedom of a minority group. The "welcoming tortellini" were cooked not with a traditional recipe in order to allow everyone to taste it including those who do not eat pork for religious reasons. This interesting example of decision of the local community and the Catholic Church, which took into account dietary religious practices of other than a Christian religion on the day of celebration of the Christian saint, is an example how normative facts are produced and experienced at the spontaneous level with a particular religious innovation. In this example, the value of integration and interreligious dialogue can be seen behind this practice of norm-establishing of the community and free expression of religion.

Another example refers to the level of state-production of the norm which is related to the values of peace and humanity. However, interpretation of social law in this case determines a legal decision about the meaning of religious symbols and religious freedom of non-religious individuals. *Lautsi v Italy* became a milestone case on religious freedom. It was twice considered in the European Court of Human Rights (ECtHR) with two opposite rulings. In 2006, Ms. Soile Lautsi as a litigant, brought the proceedings in her own name and on behalf of her two children, Dataico (11 years old) and Sami Albertin (13 years old) in the ECtHR.[7] Both children were studying in a public school in Abano Terme in 2001-2002. The applicant wished to bring up her children in a spirit of secularism, while presence of crucifixes displayed in classrooms of the public school were considered by the applicant as violation of her rights. The school authority, despite the question of Ms. Lautsi and her references to the judgment of the Italian Court of Cassation in 2002 about the discrepancy of presence of crucifix in the election places during political elections with the principle of secularism, the crucifixes were left in the rooms. Before her application to ECtHR, Ms. Lautsi applied to the Italian Courts of various jurisdictions which finally dismissed the applicant's complaint. The crucifix as a symbol of the Catholic Church, which is mentioned in the words of the 7th Article of the Italian Constitution, was considered to be "natural" symbol of the State. On November 3, 2009, Second Section of

[6] Il Giornale.it, 1 October 2019, by Sergio Rame, "Bologna, alla festa del patrono tortellini senza maiale 'per l'integrazione'", Internet access: https://www.ilgiornale.it/news/cronache/bologna-festa-patrono-tortellini-senza-maiale-lintegrazione-1761095.html, accessed 10 February, 2020.

[7] See Lautsi and ors v Italy, Merits, App no 30814/06, IHRL 3688 (ECHR 2011), 18th March 2011, European Court of Human Rights [ECHR]; Grand Chamber [ECHR].

the ECtHR with seven judges unanimously declared the violation of the Article 2 of Protocol No. 1 (right to an effective education) together with the principle of religious freedom (Article 9 of the European Convention on Human Rights). In 2010, within three months after the first ruling, the Italian Government requested that the ECtHR to refer the case to its Grand Chamber. The new hearing took place in 30 June of 2010. On March 18 of 2011, the new ruling claimed that no violation of Article 2 of Protocol No. 1 and Article 9 of the Convention were found.

During the judicial debate on the presence of religious symbols in public schools the applicant referred to legal obligations of the State to provide secular education and to "keep an equal distance from all religions"[8], the government stated that the case of crucifix "went beyond the strictly legal sphere and impinged on that of philosophy". [9] The decision of the Council of the State emphasized a broader secular meaning of crucifixes along with their religious meaning when they are present in public schools. With the references to the values of "non-violence, equal dignity of all human beings, justice and sharing, the primacy of the individual over the group and the importance of freedom of choice, the separation of politics from religion, and love of one's neighbour extending to forgiveness of one's enemies"[10], the government decision highlighted the "message of the cross" as a humanist one. While a third-party intervener, Greek Helsinki Monitor, stated that the crucifix is a religious symbol and that it does not contain secular meaning for other religions.

This example tells much more about how the law fixed in advance broadly relies on social law and impacts the process of the legal interpretation of cases on religious freedom ruled by the courts of various jurisdiction. Italian State applied interpretational schemes to emphasize the humanistic and cultural role of religious symbols contextualizing them within the constitutional and civic values while Ms. Lautsi understood them as purely religious in educational context. Two opposite rulings of ECtHR informed us about internal dynamics of law-making dependent on various perspectives towards legal and cultural traditions of defining the nature of crucifix in public life. The same religious symbol was examined vis-à-vis the system of individual non-religious beliefs and norms of public school's community revealing the linkage of normative and axiological aspects of the meaning of religious freedom.

City of Boerne v. Flores

The significant United States legal case, *City of Borne v. Flores*, entailed interactions among different levels in depth. In 1993, the American Congress passed the Religious Freedom Restoration Act (RFRA) in response to a U.S. Supreme Court ruling (*Employment Division v. Smith*) in a case that arose in the state of Oregon. The Oregon legislature had criminalized the use of the hallucinogen substance, peyote, which some Native Americans used in religious ceremonies. Note from the outset that a non-governmental[11] norm prescribing the use of peyote was in force in a population that enjoyed both a citizenship in the United States and a citizenship in a parallel quasi-sovereign entity, a tribe. Questions of tribal law never arose in the *Employment Division* case, but the very application of a state criminal law to a harmless practice of some members of a "First Nation" created an unnecessary conflict of imperatives.

The case eventually reached the U.S. Supreme Court on appeal. The Court appealed the Oregon law because it applied to all people in a non-discriminatory fashion. The Court was following the Fourteenth Amendment to the federal constitution, which held that people's rights such as the free exercise of religion (enumerated in the First Amendment) could not be violated by the individual states, such as Oregon, because of racial, religious, and ethnic ("national origin") identities. This was a matter of a textual interpretation of a governmental law. Courts in general operate within the framework of such textual analysis where a legislated text applies.

Churches and religious organizations in general foun the *Employment Division v. Smith* decision quite disturbing. While none of them contemplated using hallucinogenic substances, the court decision raised the prospect of state legislatures criminalizing aspects of the exercise of religion. So religious lobbyists petitioned Congress for protection against such possibilities, citing the "free exercise of religion" clause of the First Amendment. Congress responded with RFRA, which required that state laws be narrowly tailored when it addresses a matter of a religious practice and that any such law serve a compelling governmental interest when placing a substantial burden on the free exercise of religion. This set the stage for *City of Boerne v. Flores*.

Because of increases in the Catholic population in Boerne, Texas, the Roman Catholic Archbishop of San Antonio applied to the city of Boerne, nearby San Antonio, for a routine building permit to expand the seating capacity of the Catholic church building there. Archbishop Patrick Flores was a popular progressive public figure in the region; there was no question of him being targeted on ideological grounds. St. Peter's Church, built in 1923 in "mission style," happened to be located in a designated historical district; so the city zoning authority denied the permit. Nothing was to be altered so as to threaten the historical authenticity of the district in question. Archbishop Flores sought relief in the courts, citing RFRA.

[8] Ibid, para 32.
[9] Ibid, para 34.
[10] Ibid, para 35.
[11] While Gurvitch used the term *state law*, in this part of the presentation we use the term *governmental law*, to avoid confusion in a discussion of federal versus state laws in the U.S. framework.

The U.S. District Court for Western Texas ruled that RFRA was unconstitutional because the courts, not Congress, were supposed to define constitutionally guaranteed rights; so the ruling was in favor of the City of Boerne. The archbishop appealed to the U.S. Fifth Court of Appeals, which found RFRA constitutionally acceptable, thus siding with the archbishop. The City of Boerne subsequently appealed to the U.S. Supreme Court, which supported the original district court decision, thus siding with the city and overturning RFRA as applied to state and local cases (a later supreme court ruling, *Gonzales v. O Centro Esperita Beneficente União do Vegetal*) upheld RFRA in a case that involved a federal statute).

There are important implications of *City of Boerne v. Flores* for U.S. law, involving the First Amendment (free exercise of religion), the Fourteenth Amendment (federal powers of enforcement of constitutional rights), and the Eleventh Amendment (since 1890 with a sovereign immunity doctrine outlined in *Hans v. Louisiana*, interpreted to make States immune to litigation "in law or equity"). These are matters of governmental laws fixed in advance. However, there are other, further implications outside of governmental laws. Implicit in the action by the City of Boerne is the fact that St. Peter's Church was not only a place for the exercise of religion but had become a monument of secular historical importance. The U.S. Supreme Court decision did not address this aspect of the case. The city zoning authority decided that the church building, after seventy years, contributed to the historical character of a particular part of the city.

The city of Boerne was first settled by immigrant German Free Thinkers in 1849, naming the settlement for the author Karl Ludwig Boerne in 1852. However, the settlement was not officially incorporated as a city until 1909, though a Kendall County Courthouse in the present city dates from 1870. Given a lack of an extended history (in contrast, for example to many European cities and to nearby San Antonio, which was founded in 1718), it can be understood how a church that was not built until 1923 could become "historical" in the sense of defining the cityscape. The implication is that the emergence of a secular significance of an otherwise religious structure does not depend on a thousand year heritage or even one of centuries. The simple social construction of a secular reality could impinge upon a religious right. Such would be "social law," as Gurvitch termed it, entering into and becoming a part of governmental law. This particular exercise of social law features a physical, surface reality, an item in a cityscape, expressing a community identity.

Conclusion

Addressing the primal legal concern of theory of religious freedom about the absence of any univocal interpretation or value system behind this freedom and applying Georges Gurvitch's theory of social law, we can conclude that the search for unique axiological value or single axiological meaning of religious freedom is problematic. It is due to the variety of levels of depths of social law in its constant dialectics, the interpretation has to be discovered in the process of understanding of normative order of particular social milieu which is producing the norm. What is important in this regard is that the principle of legal pluralism has to be taken into account in its relation to social law, while designating the reference groups producing the meaning of religious freedom.

Religious freedom considered through levels of freedom and law, can be studied at the microsociological level with the method of research that puts at its center, what Gurvitch would call intuitively experienced religious freedom. This level of analysis is missing in social sciences since the focus of religious freedom scholarship is centered around violations and legal conflicts they imply or produce. However, the deepest level of intuitive experiences of religious freedom and types of norms and related values which are applied and involved, are also an important part of this scholarship, if not the most important. As the examples above showed, legal conflicts provide us with a focus on the conditions and spheres, where the discrepancies in religious freedom can appear; however, they do not give enough material for the study of religious freedom experiences as spontaneous actions of social-law production.

We need to expand our analysis of normativity in sociology, since the legal cases and their interpretations indicate that often the legal decision follow the social laws and, vice versa, social law of a particular social milieu can be affected by legal provisions of courts or state regulations. We need to consider the levels of depths of legal and social orders and to apply dialectics across them. The textual analysis of laws relevant to religion is not sufficient for the understanding of concrete socio-cultural and political contexts. There are macro-levels of social and institutional levels of social life as well. Thus to the problem of overlapping normative and axiological aspects of religious freedom can be added the question about the level of religious freedom practice.

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La rivista *Sociologia* è una delle più antiche pubblicazioni di sociologia edite in Italia (1956). Essa fu ideata da Luigi Sturzo già negli anni del suo esilio americano, in un tempo nel quale la cultura italiana tendeva ad osteggiare lo sviluppo di una disciplina che alla fine dell'ottocento nel nostro Paese aveva stentato ad affermarsi anche per la debolezza teorica che aveva caratterizzato le sue prime espressioni. La rinascita di questa disciplina dopo il secondo conflitto mondiale si deve, dunque, in gran parte al fatto che negli Stati Uniti Sturzo era già considerato uno dei sociologi stranieri più rilevanti. La nascita della rivista ha segnato, perciò, una modernizzazione degli studi relativi alle scienze sociali italiane e una riapertura del dialogo con la cultura di oltre oceano. Scorrendo i numeri di *Sociologia* si può seguire, dunque, lo sviluppo della disciplina e la maturazione culturale di quelli che, a partire dagli anni cinquanta, si sono poi affermati come i più rilevanti sociologi italiani e stranieri. L'impostazione scientifica e culturale della rivista è stata sempre caratterizzata da alcune linee di sviluppo particolarmente rilevanti che, a partire dal duemila e otto, data di inizio dell'attuale direzione, sono state riprese, specificate e approfondite. Linee di sviluppo che vanno qui di seguito ricordate. A) Valorizzazione della sociologia come disciplina generale. Se non si vuole abbandonare l'insegnamento di Comte, va considerato che la sociologia costituisce un sapere che guarda al sociale come ad un tipo di esperienza che ci consente di comprendere le ragioni dello sviluppo della vicenda umana concepita nel suo insieme. Da questo punto di vista la sociologia è nata e si è sviluppata sulla base di un rapporto dialettico e spesso conflittuale con la filosofia. B) Promozione della sociologia come scienza particolare accanto alle altre scienze dell'uomo. Infatti, il sociale, se rappresenta la modalità fondamentale di ogni tipo di espressione dell'esperienza umana, costituisce anche qualcosa che è specifico rispetto ai fenomeni che sono oggetto di altre scienze sociali: il diritto, l'economia, l'antropologia, la storia... A causa e grazie a queste due dimensioni la sociologia si può presentare ad un tempo come teoria generale e come ricerca particolare diretta a ricostruire ed interpretare dati sociali relativi e singoli settori della società. C) Attenzione alla sociologia come paradigma. Soprattutto a partire dall'età della rivoluzione industriale, la sociologia ha dato luogo ad un nuovo paradigma, quello appunto sociologico, che è divenuto qualcosa che ha caratterizzato anche le discipline limitrofe. Si pensi alla teoria delle aspettative e all'impianto non astrattamente economicistico dell'economia, all'anti-formalismo che è alla base di tutte le scienze giuridiche contemporanee, alla prospettiva che oggi qualifica la scienza politica più avanzata, alla stessa teologia, la quale si sta presentando sempre più come teologia 'pubblica', caratterizzata da un punto di vista sociologico, alla storiografia, la quale si è rinnovata già a partire dalla prima parte del novecento mediante l'inserzione del paradigma sociologico in quello propriamente storico, all'epistemologia, che per definire i concetti di verificabilità e di falsificabilità deve affidarsi alla fine ad un elemento sociologico, al consenso della comunità scientifica. Dunque, una sociologia, che voglia essere consapevole pienamente delle sue potenzialità, deve essere in continuo dialogo con le altre discipline; deve accogliere le riflessioni 'altre', proprio perché è opportuno sia attenta alla funzione svolta dal proprio paradigma nell'ambito dei saperi limitrofi. È su tali presupposti, in linea con l'insegnamento di Luigi Sturzo, che la sociologia, pur rimanendo aperta ai diversi orientamenti culturali che ne caratterizzano il percorso scientifico, può tornare a quella storicità concreta, a quella dimensione di esperienza effettiva che definisce, più nel profondo, il suo terreno elettivo. È all'esperienza, infatti, colta nella pratica della ricerca e nella sua lettura teoretica, concettuale e riflessiva, che la cultura sociologica, per andare oltre l'astratta costruzione del dato, deve rivolgere il suo sguardo. La sociologia, se vuole cogliere il carattere concreto della vita, deve riuscire a penetrare nelle strutture concettuali in cui si risolve la costituzione storica del sociale. Per questi motivi, sulla scorta delle suggestioni ereditate dai più sensibili sociologi dell'età della rinascita della nostra disciplina, la rivista *Sociologia* accoglie le riflessioni a) della teoria sociologica e della storia della sociologia, b) della ricerca empirica e dell'analisi concettuale, c) delle discipline limitrofe fondate su un impianto eminentemente sociologico. Per questo motivo ritiene di svolgere, all'interno della nostra koinè culturale, un'ineludibile funzione, tanto più necessaria, in quanto non sempre sufficientemente promossa e valorizzata anche a livello internazionale.

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