

THE PROTECTION OF THE ROMANI LANGUAGE
AND THE ITINERANT LIFESTYLE OF ROMA MINORITIES:
A FUZZY APPROACH TO THE COMPARATIVE ANALYSIS

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The purpose of this article is to analyze the legal protection of Roma minorities living in the member States of the European Union, with particular reference to the safeguard of the Romani language and the itinerant lifestyle. Roma are widespread in all Europe and their legal status may serve to test the degree of acceptance of the models of minority protection in a wide perspective. The investigation uses a so-called fuzzy approach at the comparative stage, which seems necessary to justify at methodological level the comparison of Roma groups. As this paper will try to show, the fuzzy logic is a relevant epistemological tool for comparative lawyers, in particular for taxonomic proposals.

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I. PRELIMINARY REMARKS

It is well known that the word Roma identifies a variety of ethnic groups of different origins¹. In its comprehensive meaning, as an analytical category and not as the name of the larger community, the term Roma is widespread in specialized literature, in international documents and in monitoring reports on the living conditions of these ethnic groups. In this article, I will therefore adopt the term Roma in its broad sense, considering that the analytical category cannot lead to forgetting the coexistence of different groups in many countries².

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¹ Piasere, L. *I rom d'Europa. Una storia moderna*. Roma-Bari: Laterza, 2009.

² For this reason, the sociologists use the terms of mosaic, galaxy or archipelago to indicate Roma minorities. See respectively, Liégeois, J.-P. *Roma in Europe*. Strasbourg: Council of Europe Publishing, 2007, 51; dell'Agnese, E. & Vitale, T. "Rom e sinti, una galassia di minoranze senza territorio". *Identità*

The legal status of Roma is particularly weak in comparison to that of other minorities. The social problems and the violence suffered by these groups in all Europe are generally dealt with by the international community. The commitment of international organizations to protect Roma groups is expressed in the monitoring of the States' compliance with their obligations and in the judicial guarantees related to the ratification of treaties on the protection of human rights. The political strategy of conditionality for accession to the EU, contained in the 1993 Copenhagen political criteria, provides for the ratification of the Framework Convention for the Protection of National Minorities of the Council of Europe. It also includes the legal recognition of Roma groups and the adoption of specific assistance programs addressed to them³.

The drafting of bills of rights and the establishment of international judicial organs are two aspects of the process of internationalization of human rights⁴. This process starts from activities of international organizations and influences the national legal systems, determining a multi-level protection in the European legal space. The multi-level protection has remarkable expansive capacities. It gives rise to

e integrazione. Passato e presente delle minoranze nell'Europa mediterranea. Eds. Amiotti, G. & Rosina, A. Milano: FrancoAngeli, 2007, 121 ff.; Marushiakova, E. & Popov, V. "Historical and ethnographic background: Gypsies, Roma, Sinti". *Between past and future: The Roma of Central and Eastern Europe.* Ed. Guy, W. Hatfield: University Hertfordshire Press, 2001, 33.

³ Pentassuglia, G. "The EU and the Protection of Minorities: The Case of Eastern Europe". *Eur. J. Int. Law* 1 (2001): 13 ff. With particular reference to the Roma, see Rechel, B. "Introduction". *Minority Rights in Central and Eastern Europe.* Ed. Rechel, B. London-N.Y.: Routledge, 2009, 6 and, in the same volume, see also Vermeersch, P. & Ram, M.H. "The Roma", at 68; Pogány, I. "Post-Communist Legal Orders and the Roma: Some Implications for EU Enlargement". *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders.* Eds. Sadurski, W., Czarnota, A. & Krygier, M. Dordrecht: Springer, 2006, 349 ff.; de Witte, B. & Horváth, E. "The many faces of minority policy in the EU". *Synergies in minority protection. European and International Law Perspectives.* Eds. Henrard, K. & Dunbar, R. Cambridge: Cambridge University Press, 2008, 371 ff.; Boev, Y. "L'Union européenne et les tsiganes: la logique d'un double standard". *Territoires et minorités: la situation des gens du voyage.* Ed. Drobenko, B. Limoges: Pulim, 2005, 73 ff.

⁴ See Peces-Barba, G. *Teoria dei diritti fondamentali.* Milano: Giuffrè, 1993, 136 ff.; Montanari, L. *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne.* Torino: Giappichelli, 2002, 1 ff. On the human rights codification in the European legal space, see Mezzetti, L. "La CEDU nella storia dei diritti umani". *Lo strumento costituzionale dell'ordine pubblico europeo.* Eds. Mezzetti, L. & Morrone, A. Torino: Giappichelli, 2011, 47 ff.

a kind of partial outsourcing of constitutional functions, where the protection of fundamental rights is no longer an exclusive responsibility of the States⁵.

With reference to the issue of the rights of the persons belonging to minorities, it is shared by different bodies, each pursuing a specific goal. The OSCE, the Council of Europe and the European Union set minimum standards for minority protection, thus having contributed to the establishment of a sort of international law of Roma minorities; the States are the promoters of macro-policies; the local authorities and the involved groups carry out the micro-policies⁶.

The extended catalogues of human rights and the process of internationalization are part of a trend that gives rise to a virtuous circle among national, supranational and international bodies. They are mutually influenced and enriched by this osmotic cultural process. It involves judges, scholars and practitioners in the task of interpreting European constitutional heritage, which serves as the basic unit for the protection of fundamental rights⁷.

With particular reference to the Roma condition of widespread multidimensional exclusion and discrimination, several innovative mechanisms of EU anti-discrimination law have been recently integrated in the jurisprudence of the European Court of Human Rights. There are many decisions in which the Strasbourg judges explicitly introduce the concept of indirect discrimination and

⁵ Pernice, I. "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making revisited?". *Common Market Law Rev.* 36 (1999): 707 ff.; Ferrari, G.F. *Le libertà. Profili comparatistici*. Torino: Giappichelli, 2011, 241 ff.; Ruggeri, A. "La tutela «multilivello» dei diritti fondamentali, tra esperienze di normazione e teorie costituzionali". *Politica del diritto* 3 (2007): 318; Cottier, T. & Hertig, M. "The Prospects of 21st Century Constitutionalism". *Max Planck Yearbook of United Nations Law* 7 (2003): 269; D'Atena, A. "Costituzionalismo moderno e tutela dei diritti fondamentali". *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali*. Eds. D'Atena, A. & Grossi, P. Milano: Giuffrè, 2004, 32; Demuro, G. *Costituzionalismo europeo e tutela multilivello dei diritti. Lezioni*. Torino: Giappichelli, 2009, 48.

⁶ See Palermo, F. "Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto internazionale". *La condizione giuridica di Rom e Sinti in Italia*. Eds. Bonetti, P., Simoni, A. & Vitale, T. Milano: Giuffrè, 2011, 165; Palermo, F. & Woelk, J. *Diritto costituzionale comparato dei gruppi e delle minoranze*. 2nd ed. Padova: CEDAM, 2011, 349.

⁷ See Ferrari, G.F. "I diritti tra costituzionalismi statali e discipline transnazionali". *I diritti fondamentali dopo la Carta di Nizza. Il costituzionalismo dei diritti*. Ed. Ferrari, G.F. Milano: Giuffrè, 2001, 5 ff.; Ridola, P. *Diritto comparato e diritto costituzionale europeo*. Torino: Giappichelli, 2010, 206 ff.; Rolla, G. "Le prospettive dei diritti della persona alla luce delle recenti tendenze costituzionali". *Quaderni costituzionali* 3 (1997): 444 ff.

reverse the burden of proof to demonstrate the racist behavior of public authorities against Roma⁸.

These decisions make evident the circulation of legal formants, a trend that could accelerate epoch-making changes in the European legal space⁹. The European Union is at the core of this virtuous circle of geo-legal spheres. The Council of Europe lies in the middle and the OSCE in the external sphere¹⁰. The EU represents a solid reference starting point, being the smaller and more homogeneous organization among them.

Roma recognition represents a paradigmatic case to observe the degree of acceptance of a core of values that is supposed to be well accepted in the EU¹¹. This analysis tries to assess the efficacy of the policies and the models of minority rights protection with reference to Roma groups.

This article is structured as follows. After this brief introduction, an overview is provided of the distinctive features of Roma and of the classificatory paradigm used by anthropologists to join together these groups. Thereafter, the epistemological significance of fuzzy logic in comparative law is considered. Section III tests the usefulness of this way of thinking in the elaboration of legal taxonomies. In addition, the so-called fuzzy approach in the comparison is explained, with the aim of applying

⁸ Strazzari, D. "C'è un giudice a Strasburgo! La Corte europea dei diritti dell'uomo e la tutela contro la discriminazione degli appartenenti all'etnia rom". *Il mosaico rom. Specificità culturali e governance multilivello*. Eds. Baldin, S. & Zago, M. Milano: FrancoAngeli, 2011, 194 ff.; Baldin, S. *Le minoranze rom fra esclusione sociale e debole riconoscimento giuridico. Uno studio di diritto pubblico europeo e comparato*, Bologna: Bononia University Press, 2012, 91 ff.

⁹ Ferrari, G.F. "I diritti tra costituzionalismi statali e discipline transnazionali". *supra* note 7, at 1.

¹⁰ In this sense Toniatti, R. "La transizione nei Balcani occidentali e il paradigma costituzionale europeo: il pluralismo delle fonti e delle identità". *Il pluralismo nella transizione costituzionale dei Balcani: diritti e garanzie*. Eds. Montanari, L., Toniatti, R. & Woelk, J. Trento: Università degli Studi di Trento, 2010, 363.

¹¹ According to the data of the Council of Europe and the OSCE, there are 10-12 million of Roma spread in Europe, particularly in the Carpathian-Balkan area. With reference to western countries, the percentage of Roma with respect to the total population is less than 0.5% (in Malta there are not Roma groups), with the exceptions of Portugal (0.52%), France (0.62%), Ireland (0.9%), Spain (1.57%) and Greece (2.47%). The situation in the former-communist countries adhering to EU is the opposite. In Estonia, Latvia, Lithuania, Poland, Slovenia, the Roma are less than 1% of the population. In Czech Republic the percentage of Roma is almost 2%. In the remaining States there is a higher percentage of Roma. They are 7.05% in Hungary, 8.32% in Romania, 9.17% in Slovakia and 10.33% in Bulgaria. For the statistics, see Cahn, C. & Guild, E. *Recent Migration of Roma in Europe*, CommDH(2009)37rev, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1536357> [accessed October, 9, 2012].

this methodological proposal to the case of Roma. Closer inquiry is then devoted to the legal recognition of Roma groups, the protection of the Romani language, and their itinerant lifestyle, respectively in sections IV, V, and VI. A final part of this article is dedicated to the attitude of States towards Roma, and on the relevance of an intercultural approach.

II. THE DISTINCTIVE FEATURES OF ROMA GROUPS AND THE CLASSIFICATORY ISSUE IN SOCIAL SCIENCES

Before reflecting on the legal status of Roma minorities, a discussion on the ethnic features of these groups is useful to provide the methodological perspective of the present research. The traditional aspects of Roma cultures are rather unknown. The few legal-anthropological studies available refer to a social structure where family ties are fundamental. These groups are formed by broad families and observe old rules of brotherhood. Spouses are married at a young age, women have a subordinate role, and the community respects the decisions of the customary courts of Roma, based on a set of rules and prohibitions arising from the concepts of pure and impure¹².

Few Roma groups are nomadic or semi-itinerant¹³. The vast majority of Roma are sedentary. To emphasize the differences between sedentary and itinerant communities, the terms of Roma and Travellers are respectively used, thus indicating, roughly, their different ethnic origins and cultural distance. Roma are native of India, especially concentrated in the Carpatho-Balkan area and basically sedentary¹⁴. Travellers are native Europeans, especially scattered in northern Europe and basically itinerant.

¹² See Acton, T., Caffrey, S. & Mundy, G. "Theorizing Gypsy Law". *Am. J. Comp. Law* 45 (1997): 237 ff.; Liégeois, J.-P. *Roma in Europe*. *supra* note 2, at 58 ff.; Simoni, A. "I matrimoni degli 'zingari'. Considerazioni a partire dal recente dibattito sulla 'gypsy law'". *Daimon. Annuario di diritto comparato delle religioni* (2002): 125; Mancini, L. "Il diritto zingaro. Note di antropologia giuridica". *Stato di diritto e identità rom.* Ed. Simoni, A. Torino: L'Harmattan, 2005, 178 ff.

¹³ Approximately, 20% of Roma. Piasere, L. *I rom d'Europa*. *supra* note 1, at 14; dell'Agnese, E. & Vitale, T. "Rom e sinti, una galassia di minoranze senza territorio". *supra* note 2, at 122.

¹⁴ See Pogány, I. "Minority rights and the Roma of Central and Eastern Europe". *Human Rights Law Rev.* 1 (2006): 13; Piasere, L. *I rom d'Europa*. *supra* note 1, at 60.

This distinction is not clear-cut and there are a few exceptions. For example, in the United Kingdom itinerant groups are both gypsies of Indian origin and native Travellers¹⁵. Legislation also creates definitions that have nothing to do with their origin. In France, “gens du voyage” is the legal category in which those who wander, without ethnic distinctions, are collocated. In Italy, the government act called “Nomad Emergency Decree”¹⁶ well attests the prevailing institutional approach. It does not differentiate individuals by nationality, ethnicity or inclination to itinerant lifestyle. The term nomad includes anyone who lives in conditions of marginality and segregation in the camps called “nomad camps”.

A very significant aspect is that the generic label Roma does not indicate a single minority with the same origin and language. All these groups have in common a high level of social exclusion and the fact that they are often victims of discrimination¹⁷, and the relationships with the gadjos. The gadjo is “the other”, the non-Roma. It is a term that underlines the Roma dimension by contrast. This dichotomous view of Roma and non-Roma is also applied to different Roma groups, for example to refer to communities who do not speak the Romani language, or who follow a different religion¹⁸.

Consequently, one way of investigating is to pose the following question: From a legal point of view, which could be the Roma features to use as criteria in the present research? Secondly, the cultural distance among groups that fall within the label Roma complicates the comparison, since a prerequisite for making micro-comparisons is the compliance with the requirement of homogeneity among the objects to compare¹⁹.

¹⁵ *Gypsy and Traveller Law*. Eds. Johnson, C. & Willers, M. 2nd ed. London: LAG, 2007, 3.

¹⁶ D.p.c.m. 21 may 2008 (“Dichiarazione dello stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio delle regioni Campania, Lazio e Lombardia”). With decision nr. 6050/2011, the Council of State ruled unlawful the 2008 decree declaring a state of emergency in relation to nomad settlements.

¹⁷ Piasere, L. *I rom d'Europa*. *supra* note 1, at 3; Pogány, I. “Minority rights and the Roma of Central and Eastern Europe”. *supra* note 14, at 9 ff.

¹⁸ Piasere, L. *I rom d'Europa*. *supra* note 1, at 27 ff., 89 ff.; Pogány, I. “Minority rights and the Roma of Central and Eastern Europe”. *supra* note 14, at 18; Lapov, Z. *Vácaré romané? Diversità a confronto: percorsi delle identità Rom*. Milano: FrancoAngeli, 2004, 32, 118.

¹⁹ Pegoraro, L. & Rinella, A. *Diritto pubblico comparato. Profili metodologici*. Padova: CEDAM, 2007, 58.

Thus, another question is: Which paradigm justifies the inclusion on part of anthropologists of these different groups in the same taxonomic class?

As to the first question, there are few comprehensive studies on Roma minorities, as research is usually centered on single communities. Those who, among the few scholars, have attempted to study Roma with a general focus on the basis of common features, emphasize several elements. Among these, the use of the mother tongue is increasingly stressed. Although the Romani language is not (or no longer) spoken by all groups²⁰, it is a prerequisite for Roma movements who claim the self-determination and the recognition of collective rights.

Lapov underlines that the Roma groups he has studied claim four distinctive identity spheres with respect to the majority. These are language; musical arts; customs and traditions; identity of belonging with reference to the family and the group. In this scheme, the Romani tongue is the only constant element of their culture. For this reason, language is taken as an indicator of belonging to the ethnic group²¹. Liégeois offers a general perspective of Roma with various characteristics: language, social organization, itinerant way of life, family, religion, economic organization, arts, lifestyle, and identity²². Piasere focuses on language, mobility and stability, and family networks²³.

From the legal point of view, Simoni analyzes the normative approach to the itinerant lifestyle of Travellers as the element to compare the situation in Italy, France and the United Kingdom²⁴. In another essay, I proposed a classification of Roma based on the fact that they can be seen as a disadvantaged social group, or an ethnic/linguistic minority, or as indigenous people. These typologies help me to

²⁰ Indicatively, only a quarter of the native Indian Roma speaks the Romani language. See Kovats, M. "The emergence of European Roma policy". *Between past and future: The Roma of Central and Eastern Europe*. *supra* note 2, at 97; Pogány, I. "Minority rights and the Roma of Central and Eastern Europe". *supra* note 14, at 17. One must underline that within the analytical category Roma are also included autochthonous European minorities, which therefore do not speak Romani language.

²¹ Lapov, Z. *Vačaré romané? Diversità a confronto: percorsi delle identità Rom*. *supra* note 18, at 24.

²² See Liégeois, J.-P. *Roma in Europe*. *supra* note 2, at 39 ff.

²³ Piasere, L. *I rom d'Europa*. *supra* note 1, at 10 ff.

²⁴ Simoni, A. "Tra "problema di una gente vagabonda" e "gypsy lan": le mutevoli reazioni dei giuristi europei alla presenza rom". *Stato di diritto e identità rom*. *supra* note 12, at 26 ff.

underline different aspects which reflect different protection strategies²⁵. In this paper, the focus is more deeply centered on the ethnic features that could have an impact at legislative level, i.e. the protection of the Romani language and the itinerant lifestyle. The purpose is to compare the degree of accommodation of these minority characteristics in European States.

As to the second question, in the sphere of social sciences, scholars that have treated the issue of classifications more rigorously than comparatist lawyers explain the intellectual operations that give rise to taxonomies. They distinguish the classificatory logic in two ways of thinking, related to the monothetic and the polythetic categories.

The monothetic category is a legacy of Aristotle, since his principle of non-contradiction has influenced western thought. He has left the binary or bivalent logic according to which every sentence can be only true or false²⁶. The monothetic structure is based on the idea that a certain number of features should likewise be shared by all objects for their inclusion in a class. Each feature is necessary and sufficient to establish membership to a class²⁷. The positive aspect of the taxonomies which fall within this category is the simplicity and clarity of the partitions so created, where one can assign new items easily and unambiguously²⁸.

The monothetic categories are not helpful in the analysis of objects that shun rigid categorizations, as in the legal studies and the research on human groups and their cultures. The polythetic category indicates a principle, first introduced in the

²⁵ Respectively related to the issue of social exclusion and discrimination; the promotion of the Romani language and the itinerant lifestyle; the problems regarding Roma customary law. See Baldin, S. "Le minoranze rom in Europa: proposte classificatorie e accomodamento delle istanze identitarie". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 175 ff.

²⁶ However, in the *Nicomachean Ethics* (1094 b, 11-28), Aristotle emphasizes that there are a few knowledges that are "mostly" good and are never certain and absolute.

²⁷ See Mahmood, C.K. & Armstrong, S.L. "Do Ethnic Groups Exist? A Cognitive Perspective on the Concept of Cultures". *Ethnology* 31 (1992): 4; Piasere, L. "Introduzione". *Comunità girovaghe, comunità zingare*. Ed. Piasere, L. Napoli: Liguori, 1995, 6 ff. For a legal point of view, see Glenn, H.P. *Legal Traditions of the World: Sustainable Diversity in Law*. 4th ed. Oxford: OUP, 2010, 368 ff. (this Author suggests that was Plato the first philosopher to introduce the bivalent concept); Winter, S.L. *A Clearing in the Forest: Law, Life, and Mind*. Chicago: Univ. Chicago Press, 2001, 62.

²⁸ Brennan, T. "Classification: An Overview of Selected Methodological Issues". *Crime and Justice. A Review of Research* 9 (1987): 215.

natural sciences and then used by anthropologists, to overcome the dichotomous scheme. The classes are generated via an inductive process, based on perception and immediate recognition. They reflect the classificatory strategies that work in the mind and, in this way, different groups may fall into the same category.

According to the definition offered by the biologists Sokal and Sneath, the polythetic taxonomies group together organisms that have the greatest number of shared features, and no single feature is either essential to group membership or sufficient to make an organism a member of the group. They allow us to compare in a weak form elements that resemble each other for some reason, but where no one shares specific features with all the other elements²⁹. The positive aspects of the classifications which fall into the polythetic categories lie in the fact that the classes are closer to reality, contain a high content of information and they carry less risk of arbitrary exclusion of significant features because the boundaries among the classes are not rigid³⁰.

The elements that fall into a polythetic class share with each other some “family airs”. This idea recalls the concept of “family resemblance” used by Wittgenstein to mean that the way family members resemble each other is not through a specific trait but a variety of traits that are shared by some, but not all, members of a family³¹.

A slightly different metaphor which conveys the idea of the polythetic thought is that of the “chain complex”. The chain complex was elaborated by the psychologist Vygotsky observing the way children play/think. They jump from one concept to another one on the basis of a common criterion that changes in progression: one object is connected with another by a common attribute, which in turn is connected to the next by a different attribute, and to another by yet a different

²⁹ The definition proposed by Sokal and Sneath is quoted by Needham, R. “Polythetic Classification: Convergence and Consequences”. *Man* 3 (1975): 356. See also Pignato, C. “Classificazioni politetiche”. *Dizionario di antropologia*. Eds. Fabietti, U. & Remotti, F. Bologna: Zanichelli, 1997, 172.

³⁰ Needham, R. “Polythetic Classification: Convergence and Consequences”. *supra* note 29, at 358; Brennan, T. “Classification: An Overview of Selected Methodological Issues”. *supra* note 28, at 216.

³¹ Games, which Wittgenstein used to explain the notion, have become the paradigmatic example of a group that is related by family resemblances. Wittgenstein, L. *Ricerche filosofiche*. Torino: Einaudi, 1967, § 65-67.

criterion, and so on. According to this perspective, the objects are grouped together like the links of a chain, and there is no core, or better “there is a single core that acts as the reference-sample, and is without any centre”. In these cases one speaks of serial likeness³².

In the present research, ethnic origins, customs or language characteristics are not ascribable to anyone who belongs to the label Roma. These features are variously distributed among groups as the sequence of links in a chain, where the first and the last link may have nothing in common, but they are joined because they share some traits with the intermediate rings. The Roma dimension, given by a combination of open characters, falls into the polythetic categories³³.

III. THE FUZZY APPROACH IN THE COMPARATIVE ANALYSIS OF ROMA RIGHTS

The fuzzy set theory reflects the above-mentioned reasoning. The classical set theory assumes that one can clearly distinguish between those who belong to a set and those who do not. Its paradigm is the notion of belonging on the basis of true or false condition³⁴.

On the contrary, the fuzzy set theory, proposed in 1965 by the mathematician Zadeh, imagines classes with vague boundaries. It admits that the objects in a set can belong to it but only to a certain extent. In this way, Zadeh softens the dichotomous outcome which, while trying to chase precision, may lose its significance. The fuzzy logic infringes the bivalent logic. It conceives an uncertain position expanding the

³² See Vygotskij, quoted by Veggetti, M.S. “Lev Semenovič Vygotskij”. *Trattato enciclopedico di psicologia dell'età evolutiva*. Ed. Battacchi, M.W. 2nd ed. Padova: Piccin, 1999, 545. Needham offers an example of serial likeness, describing three hypothetical societies (A, B, C), each constituted by three features included among “p” and “v”. A serial likeness is:

A:p, q, r

B: r, s, t

C: t, u, v.

See Needham, R. “Polythetic Classification: Convergence and Consequences”. *supra* note 29, at 351; and also Fabietti, U. “La comparazione in antropologia: bilanci e prospettive”. *Gli usi della comparazione*. Ed. Baldissera, A. Milano: FrancoAngeli, 2003, 61.

³³ Piasere, L. “Introduzione”. *supra* note 27, at 5 ff.

³⁴ The classical set theory reflects a fundamental way of thinking that influenced the comparatist lawyers too. See Scarciglia, R. “Il linguaggio del diritto. Regole e consuetudini nel diritto cinese e nel diritto islamico”. *Trieste multiculturale. Comunità e linguaggi di integrazione*. Ed. Scarciglia, R. Bologna: il Mulino, 2011, 65 ff.; Scarciglia, R. *Introduzione al diritto pubblico comparato*. Bologna: il Mulino, 2006, 61.

paradigm of belonging through the notion of the “degree of membership” (or degree of belonging), where the traditional Aristotelian thought establishes a precise threshold for including or excluding an element from a category³⁵.

The fuzzy set theory provides an axiom to the “truth of light and shade”, which is not included in the black or white alternative, and which ultimately permeates daily life, the reality of facts and that of phenomena observed in nature³⁶. More specifically, the objects in the set are blurred, indeterminate, polysemic, and not the whole set. This theory conceives that an object can be part of a set in a partial way, neither fully inside nor fully outside. The model in the centre of the partition is the prototype for excellence, the object that represents the emblem of the class³⁷. Within a fuzzy set, boundaries can also be defined with clarity. Thus, the monothetic categories may appear inside the polythetic ones. These clear boundaries in fuzzy sets are called alpha-cuts³⁸.

In a comparative law perspective, every taxonomic proposal is linked to the issue of relevance, which is a subjective element. This means that the classifications must have a useful aim, elaborating concepts which must be functional to the research goals³⁹. Relevance has to do with the criteria chosen to divide and catalogue the objects. It may be argued that the most suitable approach to the study of social phenomena is not that which reduces the number of variables trapping them in sharply defined classifications. It is the approach that can “hold together” in a logical and legal meaning the largest number of objects without losing the usefulness of the predictivity of the so created models. Recalling Wittgenstein, one must assess the

³⁵ In the example of old persons, at the age of five a person is surely not old (and her degree of membership will be 0), while she certainly can be defined old at ninety-five (and her degree of membership will be 1). Between five and ninety-five years old there is a grey zone, numerically presented by degrees of membership greater than 0 and inferior to 1, which grow according to age. See Sangalli, A. *L'importanza di essere fuzzy. Matematica e computer*. Torino: Bollati Boringhieri, 2000, 23. For graphical representations see Brunelli, C. “La logica *fuzzy* nell'analisi dei gruppi: criteri e possibilità”. *Sociologia e ricerca sociale* 64 (2001): 26.

³⁶ Kosko, B. *Il fuzzy-pensiero. Teoria e applicazioni della logica fuzzy*, 3rd ed. Milano: Baldini&Castoldi, 1999, 31.

³⁷ Brennan, T. “Classification: An Overview of Selected Methodological Issues”. *supra* note 28, at 216.

³⁸ See Piasere, L. “Introduzione”. *supra* note 27, at 6, 12 ff.

³⁹ In this sense, Tusseau, G. “Classificazioni”. *Glossario di diritto pubblico comparato*. Ed. Pegoraro, L. Roma: Carocci, 2009, 42.

extent of the concepts as when “spinning a thread we twist fibre on fibre. And the strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres”⁴⁰.

At the comparative stage, it seems essential to think in terms of fuzzy similarities. They are not to be conceived as operational limits but as a complex net of affinities within a specific conceptual framework. To some extent, these fuzzy similarities must join all the objects in a class. At the same time, each object is set apart from the other ones with reference to the extent of its function and its normative effectiveness. The heuristic value of a fuzzy approach to the comparative analysis is a methodology that emphasizes the comparison among legal objects closer to one another (where usually their similarities also concern the problems faced by these objects)⁴¹ in the same class. This approach can lead to more accurate observations, where the degree of similarity should be an element for making more relevant comparisons, and thus produce more interesting results at scientific level⁴².

In addition to cataloging an object, one can calculate the degree of membership to the class, while maintaining the complexity of the real world which the classical logic theory tends to exclude. How can one apply this principle, which in other sciences is represented by numbers, within the legal framework? The estimate of the degree of membership must be made on the basis of the legal elements which are the parameters of the research. Through these it is possible to quantify, to weigh, by means of the legal method, the effective functioning of the object and thus to understand the prescriptivity of the criteria. One has to keep in mind two conditions. The existence of a model that serves as a symbol in each class, and the possibility to identify clear contours, the alpha-cuts, inside the set.

The yardstick to determine the degree of membership of an object in a class is represented by the model in the centre of the set. This is a medium-type model,

⁴⁰ Wittgenstein, L. *Ricerche filosofiche*. *supra* note 31, at § 67.

⁴¹ Mattei, U. “Verso una tripartizione non eurocentrica dei sistemi giuridici”. *Scintillae iuris. Studi in memoria di Gino Gorla*. A.a.V.v. vol. I. Milano: Giuffrè, 1994, 796.

⁴² In comparative law, on the usefulness of fuzzy logic at epistemological level, see Baldin, S. “Riflessioni sull’uso consapevole della logica fuzzy nelle classificazioni fra epistemologia del diritto comparato e interdisciplinarietà”. *Revista general de Derecho Público Comparado*. 10 (2012): 1 ff.

which summarizes the properties of a certain number of objects in the set, rather than an ideal model in the Weberian sense. The prototype theory helps us to understand how objects are classified by the human mind. As long as the cognitive psychology was adherent to the classical logic, no object of a class could have had a special status, all of them sharing the same properties. On the contrary, during the Seventies, Rosch showed that there are asymmetries among the objects and that some of them serve as examples as they are perceived the most representative of a certain class. Starting from these objects, the other ones are placed in the same category on the basis of the greater or lesser resemblance, i.e. on their degree of membership compared to the prototypes⁴³.

Consequently, from the prototype, one can determine the distance of the object and understand, by identifying similarities and differences, if an element is well located or whether it should be better placed in another class. In this activity, the alpha-cuts are like the fibers that give strength to the thread. The more objects fall in the alpha-cuts or are closer to them, the more relevant the class is. The thinner the fiber (and therefore the objects are distant to the core because there are more differences), the more the degree of membership decreases and the closer one is to the boundary of the class. This is the work that comparatist lawyers always do. For this reason, understanding the epistemological values of the polythetic categories, the prototype theory and the fuzzy logic can be useful⁴⁴.

⁴³ Rosch, E. "Principles of Categorization". *Fuzzy grammar: A reader*. Eds. Aarts, B. et al. Oxford: OUP, 2004, 92 ff.; and, in the same volume, see also Lakoff, G. "The Importance of Categorization". at 163 ff.

⁴⁴ There is little research by comparatist lawyers that uses the fuzzy logic. See Arvind, T.T. & Stirton, L. "Explaining the reception of the Code Napoleon in Germany: a fuzzy-set qualitative comparative analysis". *Legal Studies* 1 (2010): 1 ff.; Casonato, C. "Il fine-vita nel diritto comparato, fra imposizioni, libertà e fuzzy sets". Available at <http://www.jus.unitn.it/biodiritto/publicazioni/docs/napoli.pdf> [accessed October, 9, 2012]; Menski, W. "Fuzzy Law and the Boundaries of Secularism". *Potchefstroom Electronic Law Journal* 3 (2010): 30 ff., available at http://www.religareproject.eu/system/files/Menski_Fuzzy%20law%20lecture_ed_formatted.pdf [accessed October, 9, 2012]; Glenn, H.P. "Legal Traditions and the Separation Thesis". *Netherlands Journal of Legal Philosophy*, 3 (2006): 229 ff., available at http://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2006/3/RenR_2006_036_003_003 [accessed October, 9, 2012]. Perhaps, the fuzzy logic seems to hold up the tripartite taxonomy proposed by Mattei, who introduces the "judgement of prevalence" (which resembles the degree of membership of Zadeh) to indicate that the legal systems may present at the same time and in different measure more than one criterion among those referred to (Mattei, U. "Verso una tripartizione non eurocentrica dei sistemi giuridici". *supra* note 41, at 782. In a later English paper, the judgement of

As an analytical category, Roma include multiple ethnic features. In a legal perspective, some claims seem more significant than others: the preservation of the mother tongue and the right of Travellers to maintain their lifestyle. There is no doubt that the protection of language rights can be claimed successfully only where the Roma category refers to those speaking the Romani language (the groups of Indian origin and not the native European groups). Equally, the protection of an itinerant lifestyle is a feature that involves these ethnic groups only partially.

How can one reconcile these data, which have an inevitable impact on law, with a comparative research which in the various legal systems should study similar objects to produce remarkable results? The present analysis will apply the paradigms of the polythetic categories and the fuzzy logic.

As Roma are characterized by a serial likeness and have in common some features like the links of a chain, a fuzzy comparative approach can be adopted. This approach aims to analyze the alpha-cuts of the Roma category, that is those sharp edges that can be found in the communities who speak Romani and those who have an itinerant lifestyle. Thus, the investigation will not be affected by negative data from those legal systems that, objectively, do not have to deal with one of these two instances of accommodation.

The distribution of Roma groups in each country has allowed me to leave out one of the two features that, in some cases, can be considered a non-essential aspect. Thus, in Ireland and the United Kingdom, where Gypsies and Travellers are officially recognized without distinctions on nationality, the Council of Europe monitoring reports are silent on the issue of the Romani tongue. Although there are persons whom ancestors had Indian origins, and there are Roma immigrants arriving from eastern Europe, the Romani language does not seem to be a significant element from the legal perspective.

Moreover, one must take into account that the facilities to live in caravans permanently have above all an impact on the living conditions and the evictions. In

prevalence is translated as “impression of hegemony”: Mattei, U. “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems”. *Am. J. Comp. Law* 45 (1997): 21.

this sense, it is a social problem (as in Greece and Portugal) and not an issue of minority accommodation. In such cases, one should take note of the circumstances, which are unfruitful in terms of group rights, and direct the analysis where there are clear signals of collective claims.

Consequently, regarding the language claims, where Roma minorities are numerous, as in the Carpatho-Balkan area, one will expect to find indicators on the use of the mother tongue at a higher degree than in those legal systems where Roma groups are small, scattered and/or not interested in the recognition of the Romani language in the public sphere. Regarding Travellers, one would expect to find a legal status suitable to their lifestyle where they prevalently live.

Using the fuzzy approach, the research will attempt to establish connections among legal systems with similar instances of minority accommodation to satisfy. The aim is to point out a trend that should emphasize similarities and differences without trying to offer a general framework, which would not be valid in all the legal systems for each of the features used as parameters of this research.

IV. THE LEGAL STATUS OF ROMA MINORITIES

The recognition of the legal status of ethno-linguistic groups involves the conferral, with different degrees of extent, of cultural and participatory rights. The mention of the minorities in constitutions means making them explicitly an integral part of a political community, to contrast any allegations of nationalism. Moreover, constitutions can offer recognition to historically oppressed groups as a symbolic act to redress past injustices, thus reinforcing their inclusion⁴⁵. Conversely, if the groups do not get the formal status of minorities, their protection can be solved in a stalemate.

⁴⁵ Toniatti, R. "La transizione nei Balcani occidentali e il paradigma costituzionale europeo: il pluralismo delle fonti e delle identità". *supra* note 10, at 367; Ringelheim, J. "Minority Protection and Constitutional Recognition of Difference. Reflections on the Diversity of European Approaches". *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instruments?*. Eds. Verstichel, A., Alen, A., de Witte, B. & Lemmens, P. Antwerp-Oxford-Portland: Intersentia, 2008, 47. For a general survey of minority recognition in the constitutions of European countries, see Palici di Suni Prat, E. *Intorno alle minoranze*. 2nd ed. Torino: Giappichelli, 2002, 111 ff.

In general, Roma are included among the social groups (without recognition), or the ethnic, linguistic, national minorities, and few scholars see similarities with the indigenous people⁴⁶. The definition depends on their aspirations, their number and location in a country, on the State approach to minorities and on the current political tendency. Only few constitutions explicitly mention Roma groups, notwithstanding the fact that they are the most numerous minorities in several countries. Roma are referred to as a “group” in Finland (art. 17 Const., and qualified as a traditional national minority in other acts)⁴⁷, and as “community” in Slovenia (art. 65 Const., as an ethnic community)⁴⁸.

On the contrary, the recognition is denied in France, Italy, Portugal, the Netherlands, Belgium, Greece, Cyprus, Denmark, and Luxembourg. In accordance with the principle of formal equality, France does not recognize minorities. Indeed, the rules on the itinerant lifestyle of the “gens du voyage” are based on an objective criterion, given by the use of mobile homes, and not the belonging to an ethnic group⁴⁹. In Italy, Roma and Sinti are excluded from the protection afforded to a dozen of historical linguistic minorities because they are not supposed to have a stable anchor in the territory⁵⁰. The same reason prevents their recognition in Portugal and the Netherlands⁵¹. In Greece, Roma are considered within the Muslim

⁴⁶ On the analogies of the Roma with the indigenous peoples, see Klímová-Alexander, I. “Transnational Romani and Indigenous Non-territorial Self-determination Claims”. *Ethnopolitics* 3 (2007): 395 ff.

⁴⁷ Parliamentary Assembly of the Council of Europe, Doc. 9397 revised, 19 April 2002, *Legal situation of the Roma in Europe*, § 11.b, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc02/edoc9397.htm> [accessed October, 9, 2012].

⁴⁸ See Panzeri, L. “La condizione giuridica della comunità rom in Slovenia tra politiche di inclusione scolastica e valorizzazione del pluralismo culturale”. *Il mosaico rom. Specificità culturali e governance multilivello*. *supra* note 10, at 210. Other two post-socialist States explicitly mention the Roma in their constitutions: they are “people” in Macedonia (preamble to the constitution, and considered as a national minority in other acts) and in Kosovo too (art. 64 const., and defined as a national minority in other acts).

⁴⁹ Le Berre, C. “Categorie giuridiche e identità etnica nel diritto francese: dalle *gens du voyage* alla ‘questione rom’”. *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 554.

⁵⁰ Mancini, L. “Il debole riconoscimento giuridico di una minoranza: il caso degli zingari”. *Diritto, immigrazione e cittadinanza* 3 (2001): 65 ff.

⁵¹ Palermo, F. “Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto internazionale”. *supra* note 6, at 158. However, Portugal has ratified the Framework Convention for the Protection of National Minorities, and the monitoring reports assess the social situation of the Roma.

community⁵²; and Cyprus includes them in the Turkish group⁵³. Belgium grants extensive protection only to other linguistic minorities⁵⁴, while Denmark declares the full integration of Roma, and Luxembourg denies the existence of minorities on its territory⁵⁵.

The remaining countries recognize the minority status of Roma in special statutes and/or as a consequence of the ratification of the Framework Convention for the Protection of National Minorities. Roma are recognized as a national minority in Ireland, Spain, and Sweden; and, in the post-socialist States, in Czech Republic, Slovakia, Romania, Estonia, Latvia, Lithuania, and Bulgaria⁵⁶. Roma are recognized as an ethnic group in Austria, Germany, the United Kingdom; just as in Hungary and Poland, where the failure to provide the status of national minority is due to the fact they do not have a mother country⁵⁷. Basically, in Ireland and the United Kingdom the focus is on the policies aiming at accommodating the lifestyle of the Travellers,

⁵² The only recognized group in Greece is the Muslim one, living in western Thrace (Meinardus, R. "Muslims: Turks, Pomaks and Gypsies". *Minorities in Greece. Aspects of a Plural Society*. Ed. Clogg, R. London: Hurst, 2002, 83). The Greek Roma are considered a social group according to the act 2790/2000 which provides for positive measures in the sphere of housing. However, it seems that the public authorities have not the legal tools sufficient to give effect to this legislation. See *Greece RAXEN National Focal Point*. Ed. M. Pavlou. 2009, 14, available at http://fra.europa.eu/fraWebsite/attachments/RAXEN-Roma%20Housing-Greece_en.pdf [accessed October, 9, 2012].

⁵³ Cyprus has accepted the Council of Europe's request to include the Roma in the monitoring reports of the Framework Convention in 2010. But it does not seem that the Roma have been recognized as a minority.

⁵⁴ The State does not recognize the Travellers, who are recognized at the regional level. Jacobs, D. & Rea, A. "Construction et importation des classements ethniques. Allochtones et immigrés aux Pays-Bas et en Belgique". *Revue européenne des migrations internationales* 2 (2005): 9, available at <http://remi.revues.org/index2487.html> [accessed October, 9, 2012].

⁵⁵ Tozzi, P. & Étienne, R. *Educational Policies that address Social Inequality. Country Report: Luxembourg*. Montpellier: Université Paul Valéry, 2008: 3, available at <http://www.epasi.eu/CountryReportLX.pdf> [accessed October, 9, 2012].

⁵⁶ And also in Croatia, Bosnia-Herzegovina, Serbia, Montenegro.

⁵⁷ Poland has included the Roma among the ethnic minorities in art. 2, par. 2, of the National and Ethnic Minorities Act of 2005. In Hungary, despite the Roma claim to be considered as a national minority, during the Seventies and again in 1993, the government recognized them as an ethnic group (Kovats, M. "Hungary: Politics, Difference and Equality". *Between past and future: The Roma of Central and Eastern Europe*. *supra* note 2, at 340; Vermeersch, P. & Ram, M.H. "The Roma". *supra* note 3, at 64; McGarry, A. "Round Pegs in Square Holes: Integrating the Romani Community in Hungary". *Minority Integration in Central Eastern Europe. Between Ethnic Diversity and Equality*. Eds. Agarín, T. & Brosig, M. Amsterdam-N.Y.: Rodopi, 2009, 257). However, in the Act LXXVII of 1993 on the Rights of National and Ethnic Minorities there is no distinction of collective rights conferred to the former and the latter, and there is no list of groups that fall into one or the other category of minority.

while in the other countries the main aspect is attached to the use of the Romani language.

Indicatively, it may be argued that the low number of Roma in western Europe, their dispersion in every country and/or a certain national attitude in order to the State recognition of minorities (or this group in particular), have provided the pretext to several legal systems not to grant Roma the official status of minority. On the opposite, in central and eastern countries where Roma are recognized as a prerequisite for the accession to the EU, the situation relies on the type of recognition. The request to be included among the national minorities has to do with rights potentially, but not necessarily, different and higher than that afforded to the ethnic groups.

V. THE PROTECTION OF THE ROMANI LANGUAGE

Individuals of ancient Indian origins, who may have interest in protecting the Romani language, can be found in many European countries⁵⁸. The language is not relevant in those who deny legal recognition to Roma minorities, namely Italy, Portugal, Belgium, Greece, Cyprus, Denmark, and Luxembourg, though one can not exclude the existence of cultural policies for promoting this language, as is expected in the Netherlands. In this regard, in the 2011 Dutch government report on the implementation of the European Charter for Regional or Minority Languages, it is observed that the consultations with representatives of Roma and Sinti do not reveal any interest in having courses taught in the Romani tongue. The main goal is to develop policies aiming at improving the educational performance of Roma children⁵⁹.

The States which remain to compare are Spain, Sweden, Finland, Austria, Germany, Slovenia, Czech Republic, Slovakia, Hungary, Poland, Bulgaria, Romania,

⁵⁸ The legal systems under examination are Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

⁵⁹ In the Netherlands, the Romani language is recognized as a non-territorial language on the basis of the European Charter for Regional or Minority Languages.

Estonia, Latvia, and Lithuania. In so doing, as parameters will be used the classical models of linguistic protection, and the provisions of the Framework Convention for the Protection of National Minorities and of the European Charter for Regional or Minority Languages⁶⁰.

The two main models for the protection of linguistic minorities are territorial autonomy and cultural autonomy. Territorial autonomy is a way to accommodate the cultural needs of groups based on the transfer of powers from the State to the local authorities where the minorities are concentrated. In its most evolved form, territorial autonomy gives rise to a federal country. It has the advantage of not requiring the prior identification of the persons belonging to the minority, a requisite that could give rise to great problems⁶¹, as in the case of the census of Roma.

Cultural autonomy is a means to safeguard those communities who are geographically dispersed within one or more States. This model of non-territorial identity, established in the Baltic States between the two World Wars, nowadays is proposed as a best practice to accommodate specific groups such as national minorities, indigenous people and Roma⁶². This system is based on the idea that the groups can be divided only on the basis of personal characteristics, and not of the territory. It allows them to organize themselves into sovereign communities regardless of their dispersion in the State.

The impossibility to claim the territorial self-determination for a group not concentrated in any specific area is counterbalanced by the recognition of public law bodies. They are responsible for managing cultural activities which are fundamental to the protection and promotion of the collective identity of a group. It is a policy that raises the problem of the preventive and systematic identification of the persons

⁶⁰ The purposes of the Framework Convention and the Charter are different. The Framework Convention aims to protect the groups through their legal recognition. It follows a sphere of rights that, in the case of linguistic minorities, embraces the safeguard of the mother tongue. The Charter, by contrast, does not confer specific rights to the speakers; the States are committed to promote policies to keep alive the lesser-used languages. However, some protection measures tend to overlap. See Woehrling, J.-M. *The European Charter for Regional or Minority Languages. A Critical Commentary*. Strasbourg: Council of Europe Publishing, 2005, 32 ff.

⁶¹ Extensively, Pizzorusso, A. *Le minoranze nel diritto pubblico interno*. Milano: Giuffrè, 1967, 355 ff.

⁶² See Kymlicka, W. "National Cultural Autonomy and International Minority Rights Norms". *Cultural Autonomy in Contemporary Europe*. Eds. Smith, D.J. & Cordell, K. London: Routledge, 2008, 48.

belonging to the minority. Moreover, it reveals its weakness in the dependency on State funds that prevent the execution of cultural activities if restricted or not granted⁶³.

Territorial autonomy is applied predominantly in western legal systems, while cultural autonomy is applied to a greater extent in the East⁶⁴. Where territorial autonomy is a well established instrument to accommodate minority claims, i.e. in the West, paradoxically Roma can not obtain such a solution because they are scarce and scattered on the territory; and, in addition, they do not enjoy the guarantees of cultural autonomy. On the contrary, in central and eastern Europe, where the presence of Roma is consistent, they enjoy territorial autonomy only locally in Slovakia⁶⁵. Cultural autonomy, while being recognized in certain legal systems⁶⁶, does not foster Roma minorities, except in Hungary and Slovenia. However, scholars are skeptical on the effective benefit that the Hungarian Roma can obtain from these institutions, because of the scarcity of funding and the ambiguities regarding the recognition of cultural rights⁶⁷. Similarly, in Slovenia the Roma Community Council

⁶³ Pizzorusso, A. *Le minoranze nel diritto pubblico interno. supra* note 61, at 384 ff.; Nimni, E. "Introduction. The National Cultural Autonomy Model Revisited". *National Cultural Autonomy and Its Contemporary Critics*. Ed. Nimni, E. London: Routledge, 2005, 1 ff.; Smith, D.J. & Cordell, K. "Introduction: The Theory and Practice of Cultural Autonomy in Central and Eastern Europe". *Cultural Autonomy in Contemporary Europe. supra* note 62, at 11 ff.

⁶⁴ Verstichel, A. *Participation, Representation and Identity. The Right of Persons Belonging to Minorities to Effective Participation in Public Affairs*. Oxford: OUP, 2009, 469, 472 ff.

⁶⁵ Roma have this form of local autonomy even in Macedonia and Kosovo. The constitution of Kosovo recognizes the Romani language as an official language at municipal level or its official use at all levels in accordance with the law (art. 5, par. 2). In Slovakia, the latest report of the committee which monitors the implementation of the European Charter for Regional or Minority Languages warns that the use of the Romani language in the public sphere, even if the consistency of Roma exceeds the threshold required to recognize this guarantee (20%), is disregarded in many municipalities. Council of Europe, *Application of the Charter in the Slovak Republic*, ECRML (2009)8, available at www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/SlovakiaECRML_2_en.pdf [accessed October, 9, 2012].

⁶⁶ Provisions on cultural autonomy are found in Estonia, Latvia, Slovenia, Hungary, Russia, and Croatia. See Klímová-Alexander, I. "Prospects for Romani national cultural autonomy". *National Cultural Autonomy and Its Contemporary Critics. supra* note 63, at 111.

⁶⁷ And due to the fact that, in this way, the socio-economic problems of the Roma are not solved; see Dobos, B. "The Development and Functioning of Cultural Autonomy in Hungary". *Ethnopolitics* 3 (2007): 458; Burton, A. "Minority Self-governance: Minority Representation in Flux for the Hungarian Roma". *Ethnopolitics* 1 (2007): 74. On the criticality of cultural autonomy experienced by the Roma, and particularly on the lack of accountability mechanisms that highlight irregular procedures or arbitrary management of these self-governments and the problems related to the representation, see Kovats, M. "The Political Significance of the first National Gypsy Minority Self-Government (Országos Cigány Kisebbségi Önkormányzat)". *JEMIE* (2001): 17 ff.; Vermeersch, P. *The Romani*

has not yet fulfilled the expectations placed with the adoption of the Roma Community Act of 2007⁶⁸.

Once verified that the models that offer the greatest protection do not serve for preserving the Romani language, the analysis will use the Framework Convention and the Charter for Regional or Minority Languages as parameters.

The Framework Convention has been ratified by all the legal systems in examination, for which its provisions have (should have) a prescriptive value. The focus is on the following two articles. On art. 12, which is used by the committees responsible for supervising the compliance with the treaty provisions to monitor the condition of Roma. It invites the States to adopt measures to promote culture, language and history of minority groups, to activate teacher training courses and to encourage the publication of textbooks in minority languages⁶⁹. And on art. 14, par. 2, which requires Member States to take measures to ensure that teaching is in the minority languages in the area inhabited by these groups.

Moreover, further emphasis on school education (from nursery school to university) in the mother tongue (from a few courses to the entire education cycle) is found in art. 8 of the European Charter for Regional or Minority Languages⁷⁰. Therefore this article will also be used to understand the effective level of protection of the Romani language.

According to the monitoring reports on the Convention and the Charter, the States and the local administrators that promote Roma culture support the publication and/or translation of texts in the Romani tongue (Spain, Sweden, Finland, Austria,

Movement: Minority Politics and Ethnic Mobilization in Contemporary Central Europe. Oxford-N.Y.: Berghahn Books, 2006, 72 ff.

⁶⁸ Human Rights Ombudsman, *Annual Report of the Human Rights Ombudsman of the Republic of Slovenia for the Year 2010*, Ljubljana, 2011, 37, available at http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/Annual_report_2010.pdf [accessed October, 9, 2012].

⁶⁹ On the importance of art. 12 to safeguard Roma minorities, see Thornberry, P. "Article 12". *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities*. Ed. Weller, M. Oxford: OUP, 2005, 373, 384 ff. The monitoring reports are available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp [accessed October, 9, 2012].

⁷⁰ Art. 8 has been signed by Austria, Germany, Hungary, Poland, and Slovakia. The monitoring reports are available at http://www.coe.int/t/dg4/education/minlang/Report/default_en.asp [accessed October, 9, 2012].

Slovenia, Czech Republic, Slovakia, Romania, and Hungary), as well as teaching courses. The courses in the Romani language are established at pre-school (Sweden, Finland, Slovenia, and Hungary), at primary level (Sweden, Finland, Austria, Slovenia, Slovakia, Romania, Hungary, and Latvia), at the level of higher education (Finland, Czech Republic, Slovakia, and Hungary), and at university, especially for training teachers (Sweden, Finland, Czech Republic, Romania, Bulgaria, and Hungary).

In other States, the situation is more uncertain or negative. In Germany there is a lack of planning by the public authorities to promote courses in the Romani language, which seems to reflect the rejection of Roma themselves of this form of protection, preferring to keep alive their language within their communities. Poland has not activated courses in the Romani language in any school career and it is also in default with respect to other articles of the Charter. In Bulgaria, the support programs are focused on integrating Roma children at school, without planning courses in the mother tongue (and in any case it would be difficult to find teachers because of the lack of an appropriate training). Estonia and Lithuania have the same scope; in these cases the monitoring reports almost do not mention Roma for their scanty presence in those countries, except for remembering the programs of assistance for their inclusion.

Similarly, the same happens in countries that do not recognize the legal status of Roma. They do not devote attention to language, but rather to the issue of social exclusion. It should also add that many Roma do not know that it is possible to request the activation of teaching courses in Romani, or are not interested because they speak the official language of the State, or do not want to perpetuate the school segregation in this way⁷¹.

VI. THE PROTECTION OF THE ITINERANT LIFESTYLE

Countries where Travellers prevalently live are France, Italy, Belgium, the Netherlands, Ireland, and the United Kingdom. The latter two have recognized Travellers officially.

⁷¹ In addition to the monitoring reports, see Pogány, I. "Minority rights and the Roma of Central and Eastern Europe". *supra* note 14, at 17.

Life in mobile homes, a major aspect of the culture of Travellers, does not necessarily imply a condition of itinerancy. It means a potentiality of the individuals to take to the road at any time, which involves a psychological aspect. In this respect, Travellers are different from nomads. A nomad who stops travelling is no longer a nomad, while a Traveller may be nomadic or sedentary. Nomadism is not a dominant or a stable feature during time, because the same families may convert their lifestyle for various reasons. Okely points out that itinerancy relies on a complex net of political, economic and ideological factors⁷². There are groups that alternate periods of sedentary life (which therefore are temporary and voluntary) with nomadism. Generational changes have been observed in few groups, with a generation of mobility and another one of sedentariness⁷³.

The legal connection between the traditional lifestyle of Travellers and cultural diversity is quite recent. Cultural diversity implies the preservation of this *modus vivendi* by way of appropriate legal measures, based on the right to maintain and develop group identity⁷⁴. The recommendation of the Committee of Ministers of the Council of Europe (2004)¹⁴ *The movement and encampment of Travellers in Europe* outlines a model of accommodation of the itinerant lifestyle involving a sphere of rights linked to the freedom of movement, the right of encampment, the establishment of an official place of residence.

Conversely, rather than conceived in a promotional way, the freedom of movement on the national territory is frequently connotated by prohibitions and restrictions,

⁷² Okely, J. *The Traveller-Gypsies*, Cambridge: Cambridge University Press, 1983, 125 ff.

⁷³ See Piasere, L. *I rom d'Europa*. *supra* note 1, at 12; Liégeois, J.-P. *Roma in Europe*. *supra* note 2, at 65 ff.

⁷⁴ With reference to the case law on Travellers, the evolution of the jurisprudence of the European Court of Human rights is emphasized by Ringelheim, J. *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme*. Bruxelles: Bruylant, 2006, 232 ff.; Marguenaud, J.-P. "Les Minorités itinérantes et la jurisprudence de la Cour européenne des droits de l'homme". *Territoires et minorités: la situation des gens du voyage*. *supra* note 3, at 17 ff.; Sandland, R. "Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights". *Human Rights Law Rev.* 3 (2008): 486 ff.; Cozzi, A.O. "Il diritto al rispetto dello stile di vita tradizionale ai sensi dell'art. 8 della Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali". *Il mosaico rom. Specificità culturali e governance multilivello*. *supra* note 10, at 174 ff.

because policies encourage or force the settlement of these groups⁷⁵. In addition, States should refrain from requiring documents other than identity cards and/or documents authorising an itinerant economic activity for national Travellers⁷⁶. What one can observe is a legal treatment of wandering that depends on “considerations related to the respect of the public order, which always seems threatened by the itinerant lifestyle”⁷⁷.

In relation to the right of encampment for Travellers, this should be accommodated through the establishment of a sufficient number of encampment sites, equipped with minimum facilities (which include water supply, connection to the electricity network, sanitary facilities and a rubbish bin). One should also have information on how to buy private plots of land and how these may be used⁷⁸. On the contrary, the encampment right that imposes a duty to the local authorities of providing equipped areas often remains an ineffective right⁷⁹, except in Ireland⁸⁰. In Italy, the regional acts on the encampment sites impose the observance of rules more rigorous than those required for public housing units. In addition, the persons who

⁷⁵ On Ireland, see Gilbert, J. “Still No Place to Go: Nomadic Peoples’ Territorial Rights in Europe”. *European Yearbook of Minority Issues* 4 (2004/5): 147; on Belgium, Kusters, J. “Criminalising Romani Culture through Law”. *Multicultural Jurisprudence. Comparative Perspectives on the Cultural Defense*. Eds. Foblets, M.-C. & Renteln, A.D. Oxford: Hart Publishing, 2009, 205; on the United Kingdom, Poulter, S. *Ethnicity, Law and Human Rights. The English Experience*. Oxford: Clarendon Press, 2003, 14 ff.; on the Netherlands, Rodrigues, P.R. & Matelski, M. *Monitor racism and the extreme right. Roma and Sinti*. Leiden: Leiden University, 2004, 26 ff. In Italy there is a sort of “sedentary nomadism”. It is a paradox because the local administrators encourage the sedentarization through housing policies towards the Roma (supposed being nomads but indeed sedentary) focused on the “nomad camps” mainly. See Piergigli, V. *Lingue minoritarie e identità culturali*. Milano: Giuffrè, 2001, 457.

⁷⁶ See the recommendation of the Committee of Ministers of the Council of Europe (2004)14 *The movement and encampment of Travellers in Europe*. available at <https://wcd.coe.int/ViewDoc.jsp?id=797221&Site=CM> [accessed October, 9, 2012].

⁷⁷ Le Berre, C. “Categorie giuridiche e identità etnica nel diritto francese: dalle *gens du voyage* alla ‘question rom’”. *supra* note 49, at 560.

⁷⁸ See the recommendation of the Committee of Ministers of the Council of Europe (2004)14 *The movement and encampment of Travellers in Europe*.

⁷⁹ On the United Kingdom, see Johnson, C. & Willers, M. *Gypsy and Traveller Law*. *supra* note 15, at 314. On Belgium, Kusters, J. “Criminalising Romani Culture through Law”. *supra* note 75, at 209. On France, Drousseau, S. “Droit au logement et à l’habitat: vers une inclusion des gens du voyage?”. *Territoires et minorités: la situation des gens du voyage*. *supra* note 3, at 115. On the Netherlands, Rodrigues, P.R. & Matelski, M. *Monitor racism and the extreme right. Roma and Sinti*. *supra* note 75, at 40.

⁸⁰ See the Second Opinion of the Advisory Committee on the Framework Convention on Ireland, ACFC/OP/II(2006)007, available at www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Ireland_en.pdf [accessed October, 9, 2012].

live in these camps are separated from the rest of the population in peripheral and closed areas⁸¹. Besides, a few States prohibit staying in unauthorized sites, and make it virtually impossible to legally encamp anywhere⁸², even in plots of private property without a public authorization, as in the United Kingdom⁸³.

With reference to the recognition of caravans as a residence, this should be the logical result of the right to the cultural diversity that safeguards itinerant lifestyle, in which the caravan is the only real home of some groups. For this reason, States should allow Travellers to have their official place of residence at the address of an individual or an association⁸⁴. In Belgium, caravans have the status of a home in the Flemish region. Since 2005, Travellers without a fixed domicile can indicate the address of a legal entity. However, some municipalities refuse to enroll Travellers in their population register⁸⁵. In addition, the address does not allow to obtain trade licenses, preventing them from exercising itinerant work legally⁸⁶. In Italy, Travellers fall into the category of the homeless and, due to the impossibility to establish a domicile, they are registered in the municipality of birth⁸⁷. In the United Kingdom,

⁸¹ See Bonetti, P. "I nodi giuridici della condizione di Rom e Sinti in Italia". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 45 ff.; Furlan, F. "Rom e Sinti nelle legislazioni regionali". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 730 ff.

⁸² So in France, Netherlands, Northern Ireland, Italy, Belgium; see Osce, *Report on the situation of Roma and Sinti in the OSCE Area*, available at <http://www.osce.org/hcnm/42063> [accessed October, 9, 2012]; Le Berre, C. "Les gens du voyage: une catégorie ambiguë, source de discrimination indirecte". *Rev. Dr. Public et Sc. Pol.* 3 (2008): 916 ff.; Gilbert, J. "Still No Place to Go: Nomadic Peoples' Territorial Rights in Europe". *supra* note 75, at 147; Spencer, S. "Gypsies and Travellers: Britain's Forgotten Minority". *European Human Rights Law Rev.* 4 (2005): 337; Bonetti, P. "I nodi giuridici della condizione di Rom e Sinti in Italia". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 44; Kusters, J. "Criminalising Romani Culture through Law". *supra* note 75, at 209.

⁸³ Gilbert, J. "Still No Place to Go: Nomadic Peoples' Territorial Rights in Europe". *supra* note 75, at 149 ff.; Niner, P. "Accommodating Nomadism? An Examination of Accommodation Options for Gypsies and Travellers in England". *Housing Studies* 2 (2004): 146 ff.

⁸⁴ See the recommendation of the Committee of Ministers of the Council of Europe (2004)14 *The movement and encampment of Travellers in Europe*.

⁸⁵ Romainville, C. & Bernard, N. "Le droit à l'habitat des gens du voyage". *Le droit et la diversité culturelle*. Ed. Ringelheim, J. Bruxelles: Bruylant, 2011, 747, 794.

⁸⁶ Kusters, J. "Criminalising Romani Culture through Law". *supra* note 75, at 206 ff.; Ringelheim, J. "Diritto e diversità culturale. La scienza giuridica di fronte alla sfida del pluralismo". *Ragion pratica* 36 (2011): 107.

⁸⁷ On this issue, see Bonetti, P. "I nodi giuridici della condizione di Rom e Sinti in Italia". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 83 ff.; Furlan, F. "Rom e Sinti nelle legislazioni regionali". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 83; Corsi, C. "I diritti delle

Travellers who do not put their caravans on authorized pitches are considered homeless too⁸⁸. On the contrary, in France a right to the *domiciliation* is recognized whereby Travellers are registered at authorized offices⁸⁹. In Ireland, the electoral legislation allows Travellers to choose where to register, if they have more than one place of residence⁹⁰.

VII. CONCLUDING REMARKS

The integration of Roma minorities through the accommodation of their claims has yet to be accomplished. To this effect, their lack of recognition in constitutions or in minority acts, particularly in western legal systems, is relevant. This choice influences the normative framework, which may be a means to hamper rather than promote the development of cultural traits. This has been observed in the limitations of freedom of movement and encampment to inhibit the Travellers' lifestyle. The solutions that should facilitate their way of life are fragmented, because these are often the result of recent and partial permissions.

Regarding the Romani language, the hypothesis of a greater extent of the legal protection where Roma groups are particularly large, in central and eastern countries, is confirmed. Here, it is worth noting that the monitoring reports register a few improvements in the last decade⁹¹. Notwithstanding this, the protection in general is still weak. This is not only due to the resistance of the public authorities. It is also due to the indifference of some Roma groups to this measure of ethnic recognition.

persone rom e sinte alla circolazione, al soggiorno e all'abitazione". *La condizione giuridica di Rom e Sinti in Italia*. *supra* note 6, at 787 ff.

⁸⁸ Johnson, C. "The rat-infested barn: Gypsies, Travellers and aversion to conventional housing". 2009: 1, available at www.lgtu.org.uk/Gypsies,%20Travellers%20aversion%20to%20conventional%20housing%20Johnson%20-%20LGTf.pdf [accessed October, 9, 2012].

⁸⁹ Mariani, F. "Iscrizione anagrafica e *domiciliation*: un breve confronto tra le istanze di sicurezza italiane e le esigenze di coesione sociale francesi". *Diritto, immigrazione e cittadinanza* 1 (2010): 78 ff.

⁹⁰ See the Third Report submitted by Ireland, ACFC/SR/III(2011)004, available at http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_3rd_SR_Ireland_en.pdf [accessed October, 9, 2012].

⁹¹ On the contrary, from the point of view of social exclusion and discrimination, the conditions of Roma have become worse in the last decade.

The EU enlargements of 2004 and 2007 have revealed what little effect the European policy aimed to safeguard ethnic groups, especially Roma, had⁹². On the other hand, if the aim of improving the living conditions of Roma had not been imposed from the outside, it would not have been included in the political agenda of central and eastern countries⁹³. The legal transplantation carried out by means of the ratification of treaties of the Council of Europe is the result of conditionality. This political strategy is severely criticized because western countries are not subject to the same constraints as post-socialist countries. Consequently, the former, as France and Greece, do not recognize and protect minorities at all. Or, where several minorities are recognized, as in Italy, Belgium, and the Netherlands, Roma are excluded from this type of legal protection⁹⁴.

Therefore, it is not surprising that the resistance to certain standards of protection transplanted by imposition⁹⁵ should appear later. One may notice the phenomenon of the rejection of legal solutions arising from the outside, being only a formal convergence in the absence of a commonality of basic values, a prerequisite for the success of legal transplants⁹⁶. The rejection is evident where the State obstructs the implementation of rules on minority protection or, in extreme cases, revises the constitution following a nationalist view, as in Hungary at present.

⁹² Sadurski, W. "Minority Protection in Central Europe and the Enlargement of the EU". *Yearbook of Polish European Studies* 8 (2004): 39 ff.; Agarín, T. & Brosig, M. "Minority Integration in Central Eastern Europe: An Introduction". *Minority Integration in Central Eastern Europe. Between Ethnic Diversity and Equality*. *supra* note 57, at 10.

⁹³ Vermeersch, P. & Ram, M.H. "The Roma". *supra* note 3, at 67.

⁹⁴ See Riedel, M. "The EU as a Promoter of Minority Rights?". *Minority Integration in Central Eastern Europe. Between Ethnic Diversity and Equality*. *supra* note 57, at 31 ff.

⁹⁵ Legal transplantation is due to two fundamental causes of: prestige and imposition. Imposition is a way of transplantation of foreign legal models that do not necessarily require the use of force. It is a phenomenon often linked to the degree of political, economic or cultural influence that a legal system has over other countries. If the reception of a model is not the result of a spontaneous adherence to certain values, it does not fall in the cases of transplant for prestige. If it is only related to mere reasons of political or economic incentives, it represents a form of transplant for imposition. This seems to be the case of the European model of human rights, transplanted by post-socialist countries to obtain political and economic advantages from the EU. On the legal transplantations, see Sacco, R. *Introduzione al diritto comparato*. 5th ed. Torino: UTET, 1992, 148 ff.; Pegoraro, L. & Rinella, A. *Diritto pubblico comparato. Profili metodologici*. *supra* note 57, at 95 ff.

⁹⁶ de Vergottini, G. "Modelli costituzionali e innovazione". *Dir. Pubbl. Comp. Eur.* 4 (1999): 1332.

Roma and Travellers represent the less tolerated case of diversity compared to other groups. The idea that Roma are to be treated in the same manner as other recognized minorities has not yet taken root in Europe, with rare exceptions. Kymlicka's statement, according to whom democracies can accept and embrace many forms of cultural diversity, though not every form⁹⁷, seems applicable to these groups. It is likely that here lies the boundary of the multicultural policies and the maximum degree of openness of a large part of European societies towards the minority rights model proposed-imposed by the Council of Europe. However, legislators make no distinction among practices incompatible with the western view of rights⁹⁸, and traditional customs that other minorities have recognized, as the rite of marriage⁹⁹ or language protection. Therefore, the process of annihilation of their collective heritage is likely.

The relationships between the majority and minorities can also be seen in a different light compared to the multicultural approach. Interculturalism aims to create an atmosphere of mutual recognition and comprehension among different groups. Its paradigm is that cultural differences should not be accentuated just as much as similarities should not be lost. Finding a core of shared values, that in the European legal space can be easily identified in the principles of human dignity, equality and freedom, is the main aspect. Moreover, this implies that the majoritarian group is to stay on the same level as other cultural entities, each of which should change on the basis of these interactions¹⁰⁰.

⁹⁷ Kymlicka, W. *La cittadinanza multiculturale*. Bologna: il Mulino, 2002, 265.

⁹⁸ Timmerman, J. "When her Feet touch the Ground: Conflict between the Roma Familistic Custom of Arranged Juvenile Marriage and Enforcement of International Human Rights Treaties". *Journal of Transnational Law & Policy*, 13 (2004): 490 ff.

⁹⁹ On the discrimination of a Roma widow, married with the traditional rite only, see the case of the European Court of Human Rights *Muñoz Díaz v. Spain*, no. 49151/07, 8 december 2009.

¹⁰⁰ Bouchard, G. "What is Interculturalism?". *McGill Law J.*, 2 (2010): 437 ff.; Giménez Romero, C. *Interculturalismo. La proposta teorica di un'equipe universitaria spagnola*, available at www.fttr.it/fttr/allegati/396/INTERCULTURALISMO%20-%20Gimenez.pdf [accessed October, 9, 2012]. Some comparative lawyers recall the fuzzy logic behind this dialogic process, which can lead to new forms of diversity accommodation by providing rules generated by the encounter among cultures. See Menski, W. "Fuzzy Law and the Boundaries of Secularism". *supra* note 44, at 30 ff.; Glenn, H.P. "Legal Traditions and the Separation Thesis". *supra* note 44, at 229 ff.

Strengthening the intercultural approach could be a fruitful perspective for those whom, as Roma groups, are often discriminated against and excluded from the public life of the community. It is well known that intercultural dialogue is fundamental at school level. In this perspective, intercultural education is a strategic tool for the social integration of minorities, including Roma and Travellers¹⁰¹. This approach could contribute to the reduction of the distance between Roma and non-Roma, fighting against negative stereotypes, discrimination and segregation. Intercultural dialogue represents a significant shift towards the preservation of groups compared to the traditional internationalist approach, a shift visible in the Framework Convention for the Protection of National Minorities of the Council of Europe¹⁰². This is the first step in the building of tolerant societies, on the basis of which it is possible to confer a sphere of group rights for those minorities who claim the recognition of their cultural identity.

¹⁰¹ See Thornberry, P. "Article 12". *supra* note 69, at 373; Ringelheim, J. "Minority Rights in a Time of Multiculturalism - The Evolving Scope of the Framework Convention on the Protection of National Minorities". *Human Rights Law Rev.*, 1 (2010): 119 ff.; O'Nions, H. *Minority Rights Protection in International Law. The Roma of Europe*. Aldershot: Ashgate, 2007, 131 ff.

¹⁰² Ringelheim, J. "Minority Rights in a Time of Multiculturalism". *supra* note 101, at 101.