

# The Right to Roam



The Right to Roam:  
Travellers and Human Rights  
in the Modern Nation-State

By

Dualta Roughneen

**CAMBRIDGE  
SCHOLARS**

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P U B L I S H I N G

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by Dualta Roughneen

This book first published 2010

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data  
A catalogue record for this book is available from the British Library

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ISBN (10): 1-4438-1871-2, ISBN (13): 978-1-4438-1871-1

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## ACKNOWLEDGEMENTS

I would like to thanks the following for their assistance and advice in preparing this volume: Mary Rose Walker, Micheal O hAodha, Judith Okely, Jean Pierre Liegeois, John Acton, Camilla Nordberg, Martin Collins and all at Pavee Point, Jim O Brien and the Bray Traveller Community Development Group. Special thanks to Iseult Honohan & Adina Preda.



## LIST OF ABBREVIATIONS

CERD	Committee on the Elimination of Racial Discrimination
CO	Concluding Observations
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities
GR	General Recommendations
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IHRC	Irish Human Rights Commission
LA	Local Authority
LTACC	Local Traveller Accommodation Consultative Committee
NTACC	National Traveller Accommodation Consultative Committee
TAP	Traveller Accommodation Programme
UDCD	Universal Declaration on Cultural Diversity
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization



## SUMMARY

In Ireland, and in most of the modern world, sedentary living is accepted as the norm, and transient groups across Europe are pathologised as inferior and abject. Recent legislation in Ireland has rendered the possibility of leading a transient lifestyle virtually impossible as the distribution of private and public property is suited to the demands of sedentary living. The right to live a nomadic life is a valid lifestyle choice, and one that is important to Traveller groups. When human rights are viewed as protections of our status as normative agents then denial of the freedom to pursue an important conception of a worthwhile life threatens this status. When nomadism is restricted or denied, not only is liberty infringed but the autonomy of those to whom the lifestyle choice is important is threatened through denial of this conception, and also through a lack of recognition of this important aspect of their identity. Many Irish Travellers continue to attempt to live a transient lifestyle, and those Travellers who have ceased Travelling remain identified through their nomadic tradition. The availability of nomadism as a conception of a worthwhile lifestyle and the liberty to pursue this conception are important in protecting the status of those who value such a lifestyle as normative agents. In Ireland, recognition of Travelling as a valid lifestyle choice requires attaining a balance between the demands of a sedentary majority and a transient minority. As a protection of normative agency, a human right to maintain a travelling lifestyle ensures the requirements of the transient minority are not subsumed beneath legislation and policy that promotes only sedentary living as a valid conception of a worthwhile life. When providing for a right to live a nomadic life, for groups to whom this lifestyle is especially valuable, such as Irish Travellers, a substantive conception of equality would disallow the imposition of legislation which subordinates status groups to the exigencies of majority society. For Travellers, legislation which marginalises Travelling, for the benefit of sedentary society would be viewed as unconstitutional were a substantive view of equality to be interpreted by the courts. The 2002 Housing (Miscellaneous Provisions) Act is one such act, rendering a transient lifestyle virtually impossible, while at the same time, criminalising those it affects most, not just for what they do, Travelling, but for who they are, Travellers. A substantive view of equality, which considers the impact of

legislation on autonomy, as a means by which groups are subordinated, should provide for ensuring the autonomy of Travellers is protected through facilitating the possibility of leading a nomadic life, balanced with the requirements of sedentary society, not subsumed beneath the demands of sedentarism.

# INTRODUCTION

The conflict between a sedentary lifestyle and nomads can be traced to the 'dawn of mankind'. The battle between Cain, the 'tiller of the ground' and Abel, the 'keeper of sheep', is one of the first articulations of a contest that perpetuates itself to this very day.

"Now Abel was a keeper of sheep, and Cain a tiller of the ground. In the course of time Cain brought to the LORD an offering of the fruit of the ground, and Abel brought of the firstlings of his flock and of their fat portions. And the LORD had regard for Abel and his offering, but for Cain and his offering he had no regard. So Cain was very angry, and his countenance fell. The LORD said to Cain, 'Why are you angry, and why has your countenance fallen? If you do well, will you not be accepted? And if you do not do well, sin is couching at the door; its desire is for you, but you must master it.' Cain said to Abel his brother, "Let us go out to the field." And when they were in the field, Cain rose up against his brother Abel, and killed him."<sup>1</sup>

The conflict between sedentarised groups and nomadic peoples exists in Africa, the Middle East, across Europe, Australia, Canada, and in Ireland. In Africa, the Tauregs of Algeria and Morocco are an example of a nomadic people struggling to maintain a nomadic lifestyle in the face of the establishment of the nation-state whose borders cut across their traditional pastoral routes. The perpetual conflict in Darfur continues to be defined as one with its roots in the spread of desertification and increasing pressure on nomads to impinge on lands of settled farmers further south. Often ignored in the Middle East conflict, the establishment of the State of Israel has resulted in the marginalization of the Bedouin nomads in the Negev desert. The Aboriginal people of Australia have had their nomadic way of life decimated by the colonization of the sub-continent, resulting in elevated levels of suicide, depression and alcoholism. Inuit hunters in the Arctic in Canada base their existence on nomadic and semi-nomadic herding of reindeer and live in conditions in Northern Canada, with health indicators similar to those in developing countries. The primary example in Europe is the continued marginalization and discrimination of Roma Gypsies in Eastern Europe, and the increasing discrimination experienced in Western Europe as the Roma population escapes from behind the 'Iron

Curtain', facilitated by the accession of Eastern European countries to the European Union and the freedom of movement this brings. In Ireland, the competition between sedentarism and nomadism is manifested in the demands of the Irish Travellers<sup>2</sup> to be allowed to maintain their traditional lifestyle.<sup>3</sup> Throughout the world it is considered that there are three categories of nomadic peoples: 'pastoral nomads, nomadic hunter-gatherers, and peripatetic service nomads'.<sup>4</sup> The Irish Traveller is part of the third group, often referred to as 'commercial nomads'. It is possible to attempt to sub-divide Irish Travellers into a number of broad categories.

"There are: full-time Travellers who travel more or less throughout the year; seasonal Travellers who travel all or most of the summer but return to a base in winter; holiday Travellers who are basically settled but travel in caravans for a few weeks in the summer; special occasion Travellers who are basically settled but travel in caravans for family or other occasions; and settled Travellers who travel little or at all but still regard themselves as Gypsies or Travellers. Full-time and longer seasonal travelling is most closely geared to work opportunities; most travelling seems to be related to some clear purpose, whether economic, social or cultural."<sup>5</sup>

There are currently 22,369 Travellers in Ireland, making up less than one per cent of the population.<sup>6</sup> Of these, 5,543 are considered to be living in temporary accommodation, either on official or unauthorized transient sites.<sup>7</sup> While the relative numbers of this group seem small, popular discourse continues to centre on the activities and actions of this small group, as well as attitudes of settled society, in the media, in local and national government, and in daily discourse.

In each case, nomadism involves movement. It does not require that the nomad is of no fixed abode; however the nomad lives a transient lifestyle. Pastoral nomads move flocks of animals from place to place seasonally, in response to the needs of the flocks. This usually follows a regular, seasonal pattern. The Turkana in Northern Kenya, currently suffering from the effects of years of drought, fall under this category, as do the Zarghawa tribe in Darfur, one of the many tribes enduring protracted conflict in the west of Sudan. Nomadic hunter-gatherers also move in response to the seasons- following the migratory patterns of animals and the annual regeneration of wild fruits. The Aboriginal inhabitants of Australia would be viewed historically as nomadic hunter-gatherers, while the San, a group of less than 10,000 in Namibia, continue to live a traditional hunter-gatherer lifestyle. Commercial nomads are usually transitory- providing service or seeking business of a 'seasonal' or periodic nature. The commercial nomad often depends on filling a specific

demand in an area, then moving on to another area, once the demand declines. Traditionally in Ireland, where the demand was for tinsmiths or goldsmiths, local requirement would be filled quickly and refreshed at a certain period in the future. In the U.S. today, many Irish Travellers are nomadic pavers. They move from area to area repairing roads and driveways, reacting to demand in the market. In Ireland commercial Travellers attend seasonal fairs and informal markets. Travellers' occupation has been described as 'the occasional supply of goods, services and labour where supply and demand are irregular in time and space'.<sup>8</sup> While nomadic hunter-gatherers are very rare, and commercial and pastoral nomadic groups are more prevalent, even among these sub-categories, there is too great a variability of cultures to be able to consider any one 'group' as a typical example of each sub-category.

Though it is not the subject of this volume, it is worth mentioning that the history and origins of the Irish Traveller remain obscure. There are many theories and debates as to the origins of the Irish Traveller. The 1963 Commission on Irish Travellers did not acknowledge the possibility or the theory that Irish Travellers were a separate historical group. The Commission presented the Travellers as a group who had descended from Irish Society, or who had somehow 'dropped out' of mainstream society.

"The existence of itinerants in Ireland has been ascribed to many causes. It is said that they are the descendants of the remnants of Irish tribes dispossessed in the various plantations. Some are said to be the descendants of the journeying craftsmen and metal workers who travelled the country centuries ago. Others are said to be the descendants of those who were driven to a wandering way of life because of the poverty and distress caused by the famines of the last century, the oppressions of the penal law era and earlier. It is likely that a combination of all these factors to a greater or lesser degree was responsible for the greater number of those now on the road."<sup>9</sup>

The Commission, while placing a negative connotation on the origins of Travellers, portraying the groups as society's failures, the weak who could not keep pace with change, the Commission also attempted to dispel the idea that Travellers are a single, homogeneous group.

"Itinerants (or travellers as they prefer themselves to be called) do not constitute a single homogenous group, tribe or community within the nation although the settled population are inclined to regard them as such. Neither do they constitute a separate ethnic group. There is no system of

unified, authority or government and no individual or group of individuals has any powers or control over the itinerant members of the community.”<sup>10</sup>

Other theories have attempted to associate the Irish Travellers with Travellers in the UK, and with the Roma-Gypsy Traveller groups who have dispersed to most corners of Europe, possibly originating in North-western India in the 13<sup>th</sup> century. This theory has largely been discredited through a variety of channels, one being an examination of the comparative linguistic history of both groups. It is ironic that while the Irish Traveller struggles for recognition as a status group, the dispersed Roma-Gypsy group has become regarded as a transnational minority, with special representation at the European Union and the Council of Europe.

Regarding the Romany in Central and Eastern Europe, Barany points out that

“they comprise an extremely diverse ethnic group that can be differentiated according to lifestyle (peripatetic or sedentary), tribal affiliation, occupation, language, religion, and the date of arrival in a given country.”<sup>11</sup>

The geographical scope and the diversity of occurrence of this ‘group’ creates a challenge in articulating a coherent political approach to a group that is the largest minority across the European Union, yet exist in differing, yet similar, circumstances in so many countries.<sup>12</sup> Barany further points out another complication when considering the Roma populations; ‘some ethnic communities, like the Roma, are so deeply split along occupational, tribal, or other lines that one organization could not possibly articulate all their interests’.<sup>13</sup> One commonality running through Gypsy-Traveller and Roma groups is that they continue to be marginalized, historically persecuted and have been subject to severe racism, social and economic disadvantage, and, forced population movement.<sup>14</sup> Linguistically, the Roma/Gypsy Travellers do not share a credible identity- the Irish Traveller and English Traveller speak both English, and different ‘group’ languages (in Ireland ‘cant’ or ‘gammon’ is the common term to describe the language of the Traveller), while the various Romany populations throughout central and eastern Europe, even within countries, speak different versions of the language which are unintelligible to other ‘tribes’.<sup>15</sup> There is even a question mark over the reality of a Romany nationalism, and Kovats believes that ‘creating’ a nationality for such diversity, is dangerous, in that it will further marginalize the group(s).<sup>16</sup> Though the Roma-Gypsy groups continue to struggle against marginalization throughout Europe, they are recognized as a distinct ethnic

group despite such diversity, while the Irish Traveller, considered distinct, and generally homogeneous, in everyday discourse, struggles for such recognition.

Irish Travellers continue, even in modern-day Ireland, a country that, until 2008, considered itself to be one of the most modernised and progressive countries in the western world, to seek to find space- physical, societal and legal- that provides for a right to live a nomadic lifestyle, a lifestyle that they have maintained for centuries.

“You ask any Traveller and they will tell you. We have been doing it for centuries and why can’t we do it now. What’s so different about Ireland now? What’s today’s Ireland from the past when it wasn’t an issue for Travellers to travel.”<sup>17</sup>

Travellers feel that their way of life is being eroded and marginalized by sedentary society, as it no longer fits in with the modern view of Ireland.

“Travellers were needed to fix their buckets and the like, to do the spuds or whatever. They used to love to see the Traveller coming. They’d even wait. Things are changed. Travellers are not wanted anymore. You have to stop being a Traveller cos the settled person doesn’t want you any more.”<sup>18</sup>

In order to retain a transient lifestyle Travellers are seeking recognition of this lifestyle through the enacting of policy and legislation that does not marginalize or inhibit Travelling. This requires a network of transient halting sites around the country which provides for both short-term and longer-term residence. Public and private land is managed at present in a manner such that there is limited space available for travelling as required by Travellers. Also required is a revision of planning legislation which allows for Travellers to use their own land for temporary residences, as current planning legislation favours ‘brick and mortar’ housing. Other areas required to allow for a nomadic lifestyle are improved outdoor market regulations. Travellers’ movement is essentially commercial and recent changes in issuing licenses for open markets, as well as increased costs of accessing open markets, have made moving from fair to fair economically unviable.

“A lot of policy documents that have been made between Traveller organizations and various government departments. Those policy documents have not been implemented, sometimes not in full, or not at all, or in a haphazard manner.”<sup>19</sup>

While there is an increasing literature on nomadism and indeed on Irish Travellers and Roma/Gypsy Travellers, there has not been a substantive examination of the right to live a nomadic life. Contemporary society accepts sedentary living as the norm and there has been a historical unease with nomadic living especially since the beginning of empire and nation building; this unease manifesting itself in a variety of forms from integration and assimilation of nomadic groups, to slavery and ethnic cleansing.<sup>20</sup> This volume was prompted by a recent resurgence in hostilities in Ireland to the increasing number of Roma/Gypsies in Ireland as well as the on-going debate in public discourse and the media regarding the ‘problem’ of the Travelling community. As both groups have histories and cultures associated with nomadism, this volume seeks to look at nomadism and whether there is a *prima facie* right for these groups to maintain a nomadic way of life, and how this right may exist alongside the exigencies of sedentary living, rather than be absorbed into, or subsumed beneath, them.

The first section of this volume will look at the situation of nomadism with respect to existing law, both international, and nationally in Ireland. The volume will outline the legal right to nomadism as it exists at present and examine this right in conjunction with recent legislative Acts in Ireland. The second section will examine human rights from a normative perspective, based on the idea that human rights are generated from the protection of the status of the human person as a normative agent, requiring autonomy, liberty and welfare. The third section will determine whether there is a *prima facie* moral right to live a nomadic life from this perspective based on the protection of the status of individuals as normative agents. This section will examine autonomy from an intersubjective perspective dependant upon societal and legal recognition, rather than viewing autonomy as a conception of atomistic individuals. The volume will conclude that there is a moral right to live a nomadic life and this should be balanced with, rather than subsumed beneath, the demands of sedentary society. The final section will examine this right that exists for only a portion of society, and how different conceptions of equality can be interpreted to guarantee that a right to live a nomadic life is protected from legislation which subordinates this conception of a worthwhile life to the exigencies of the ‘common good’ as viewed by a majority sedentary society.

**PART I:**  
**THE LEGAL EVOLUTION**

## CHAPTER ONE

### THE DEVELOPMENT OF INTERNATIONAL LAW

While this section will not attempt to cover all aspects of the development of international law that have impacted on nomadism, some of the major developments will be highlighted. The development of international law over the centuries has been anathema to nomadism. During the colonial period, the concept of *terra nullius* was advocated as justification for claiming rights to unused land or empty spaces.<sup>1</sup> John Locke, in his *Essay Concerning the True Original Extent and End of Civil Government* espoused the view that only cultivated land could constitute true ownership of land.<sup>2</sup> Locke proposed that mixing one's labour with the land granted ownership.<sup>3</sup> Nomads were not considered to have cultivated or mixed their labour with the land they occupied, and as such, the land was considered to be *terra nullius*, free to be colonized and acquired for empire.

Vattel, considering the colonization of the Americas, claimed that Native American tribes (Indians)

“cannot take to themselves more land than they have need of or can inhabit and cultivate.”<sup>4</sup>

In his *Principles of International Law*, Lawrence stated that

“Even if we suppose a nomadic tribe to have attained the requisite degree of civilization, its lack of territorial organization would be amply sufficient to exclude it from the pale of international law.”<sup>5</sup>

Thus, nomads came to be excluded from claiming tenure over land in international law as it developed in theory and practice. In Western Sahara, the International Court of Justice in 1975, debated how nomadic peoples were related to the territories they occupied. The ICJ was concerned with whether, at the time of colonization by Spain, Western Sahara constituted *terra nullius*. The ICJ determined that land occupied by

nomadic tribes was not *terra nullius*. However, the ICJ did not consider that the nomadic peoples could claim sovereignty over the territory, instead attempted to determine which state the nomadic people claimed allegiance to.<sup>6</sup> Nomadic people could, however, claim legal title to land within the state. This was the first recognition of nomadic people having legal tenure to land. The International Labour Organisation, through the development of the rights of indigenous people, established that certain nomadic tribes did have 'collective ownership' of areas of land.<sup>7</sup>

Martinez Cobo defined indigenous peoples as follows:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."<sup>8</sup>

However, this was not recognition of nomadism as a right *per se*, merely that certain peoples prior to the establishment of national legal systems did have an effective, and unilateral, attachment to an area through traditional use of the land. Maintaining this attachment, in Canada and Finland, for example, has not required that the nomadic peoples continue traditional methods of using the land. The Inuit in Canada, and the Saami in Finland, use helicopters and snow-scooters, respectively, to manage their herds of reindeer.

Though international law has not established a right to live a nomadic life, decisions in international law determined that nomadic peoples could establish legal ownership of, but not sovereignty over, the land that they traditionally occupied. The impact of this approach is such that nomadic groups, under the auspices of international law, can lay claim to certain rights within a nation-state, which is oriented toward sedentarism, but cannot exist as an independent entity, outside of sedentary society.

## CHAPTER TWO

### INTERNATIONAL BODIES AND TREATIES TO WHICH IRELAND IS A MEMBER

Though the development of customary international law has not established a right to live a nomadic life, the citations above show that there has been a gradual shift from ignoring the rights of nomadic people over land they traditionally occupied, to an acceptance that nomadic groups have certain rights and a general rejection of the notion of *terra nullius*. More recent human rights treaties, bodies and conventions have continued to establish rights of members of indigenous, traditionally nomadic, groups.

The International Covenant on Civil and Political Rights (ICCPR), Article 27 states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own *culture*, to profess and practice their own religion, or to use their own language.”<sup>1</sup>

In relation to this article, General Comment 23 of the Human Rights Committee states:

“With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources.”<sup>2</sup>

Article 27 of the ICCPR protects the rights of members of ‘ethnic, linguistic and religious minorities’ to ‘enjoy their own culture’. General Comment 23 confirms that culture is connected with a way of life associated with how land is used. Nomadism is intimately connected with a particular use of land resources in a manner that is different to that of

sedentary living. Nomadism is attached to land in a non-permanent manner, and requires access to land on an intermittent basis. Culture, according to UNESCO,

“should be regarded as the set of distinctive, spiritual, material, intellectual and emotional features of society, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>3</sup>

Traditions held by members of certain groups include nomadism. Nomadism is part of a particular mode of living together, and nomadic groups embrace particular value systems distinct to those of sedentary society. As stated in the previous sections, the traditions held by minority groups are fluid and they are entitled to change and adapt with modernity. It is not required that traditions remain archaic, or rooted in the past, to be considered the traditions of the minority group. The Saami have adapted their means of shepherding to suit available technologies, while Traveller groups no longer follow the romanticized horse and cart model of Gypsy Travelling.

The Equal Status Act of the Oireachtas, 2000 states:

“Traveller community” means the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, **a nomadic way of life** on the island of Ireland.”<sup>4</sup>

Nomadism is directly related to the culture of Irish Traveller, a culture is rooted in tradition, tradition that is entitled to change and adapt with the times. For communities with a tradition of nomadism, tied to the culture of the community, international instruments determine that the right to maintain such a lifestyle exists. The Irish Traveller, under the Equal Status Act, should be afforded this right also.

The Irish Governments periodic reports to the Committee on the Elimination of Racial Discrimination (CERD) states that:

“The government’s view is that Travellers do not constitute a distinct group from the population as a whole, in terms of race, colour, descent or national or ethnic origin.”<sup>5</sup>

It is the government’s view that Travellers are not protected under International Law as an ethnic group. Members of the Travelling community

are not protected under Article 27 of the ICCPR, and maintaining Traveller traditions and culture, including a nomadic lifestyle, is not a right afforded to the Irish Traveller, when ethnic status is denied.

The Human Rights Committee, in General Comment 23, on Article 27 of the ICCPR, states that:

“the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by the state party but requires to be established by objective criteria.”<sup>6</sup>

Whether Travellers are considered an ethnic group cannot be decided by *fiat* of the state party, as it seems has been attempted by the Irish Government. Ethnicity is a concept, and like many others, has evolved and continues to be influenced by debate and real-life interaction and observances.<sup>7</sup> The process of defining ethnicity has moved from one which centred upon race as a particular separating factor, through debating the social constructivist approach to ethnic definition such as influenced by social entrepreneurs who attempt to ‘manufacture’ ethnic division as in the lead up to the Balkan Wars or in Rwanda under Belgian occupation. More recent discourses on ethnicity focus on identification and self-identification, and these approaches regard ethnicity as fluid concept. The debate between a primordial and a constructivist approach continues, focusing on whether ethnicity is something that actually exists, or has been constructed by society. Many commentators including the House of Lords in the U.K. have established objective criteria for the determination of an ethnic group. The Mandla Criteria established by the House of Lords is broken down into the following areas

#### **Essential Criteria**

- A long shared history coupled with a conscious sense of distinctness;
- A cultural tradition of its own including family and social customs often but not necessarily associated with religious observance.

#### **Relevant Criteria:**

- A common geographical origin or small number of common ancestors;
- A common language not necessarily peculiar to that group;
- A common literature, including folklore or oral traditions;
- A common religion different from that of neighbouring groups <sup>8</sup>

Following such an approach as that taken in the House of Lords, which establishes criteria for determining the ethnic status of a group, and an examination of this approach with respect to Travellers, would render

the denial of ethnic minority status by *fiat* of the Irish Government as invalid.<sup>9</sup> However, such an approach has not been followed, though Ni Shuinéar states that “Irish Travellers meet all the objective scientific criteria of an ethnic group” citing biological self-perpetuation, shared fundamental cultural values, overt unity of cultural form and social separation, own field of communication and interaction, self ascription and outside ascription.<sup>10</sup>

In its examination of Ireland’s 3<sup>rd</sup> Periodic Report the CERD says the State

“should take steps to recognize Travellers as an ethnic minority group.”<sup>11</sup>

In its report to the Framework Convention for the Protection of National Minorities (FCNM)<sup>12</sup> of the Council of Europe, the Irish Government states that the Irish Traveller is a “self-defined group”, and that

“their culture and way of life, of which nomadism is an important factor, distinguishes Travellers from the sedentary population...Travellers do not constitute a distinct group from the population as a whole in terms of religion, language or race, they are however, an indigenous minority.”<sup>13</sup>

This acknowledgement of Travellers as an indigenous minority, falls short of recognising Travellers as an ethnic group, thus creating responsibilities under international law for the Irish State toward Travellers as an ethnic group. It must be noted that this concession toward Travellers was given under the FCNM, a framework, rather than a legally binding Treaty.

The dualist nature of Irish law effects that any International Treaty or Covenant is not immediately incorporated into Irish Law, but requires that separate Acts by the Oireachtas be enacted to create laws.<sup>14</sup> The ECHR Act 2003 incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into Irish Law. Section 2(1) requires the Irish courts, when interpreting the Law to take account of obligations under the ECHR,<sup>15</sup> which is continually being interpreted by the European Court of Human Rights (ECtHR). Section 3(1) of the Act requires State organs to undertake its functions in a manner that is compatible with the obligations of the State under the ECHR.<sup>16</sup>

Article 8(1) of the ECHR states that: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’<sup>17</sup> In accordance with this Article, the ECtHR, in *Chapman v. United Kingdom*,

held that there is a positive obligation on the State to facilitate the Traveller and Gypsy way of life.

“the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.”<sup>18</sup>

Though the case does not state the extent to which the obligation exists, however, by virtue of the ECHR Act 2003, Ireland is required to take this judgment into account in its courts as well as in the functioning of any state organs.

Nomadism has been identified as an ‘important factor’ in the ‘culture, way of life’ of the Irish Traveller but is dependent on the identification of the Travellers as an ethnic group to constitute requiring protection under international law, as the Equal Status Act extends to ethnic, linguistic and religious minorities, not to national minorities, the status under which the Irish State officially recognises Travellers.<sup>19</sup> So, if Travellers were identified as an ethnic group, the Irish State would recognise a right to be nomadic, as nomadism is considered part of the tradition of the Traveller groups. However, the recognition of this importance does not identify the right to live a nomadic as a *prima facie* right in itself, it would only be an associated right, contingent on ethnic identification and an association with the traditions of the ethnic group. The following section will look at existing legislation in Ireland and how these legislative Acts affect the possibility of Travellers, as well as other groups, leading a nomadic lifestyle.

## CHAPTER THREE

### RELEVANT LEGISLATION IN IRELAND

Though there is neither a prescription for, nor legislation forbidding, the possibility of living a nomadic life, there are a number of recent Acts of the Oireachtas that affect the possibility of following a nomadic lifestyle. This section will look at these Acts in conjunction with Bunreacht na hEireann (Irish Constitution) to determine both their compatibility with the Irish Constitution and their effect on nomadism for the Irish Traveller.

The Preamble to the Irish Constitution states:

“...seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained ...”

The constitution does not specify what the Irish view of true social order is expected to be. However, Article 3 of the Constitution provides an insight into what the vision of the constitution is.

Article 3(1) of the Irish Constitution states:

“It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions.”<sup>1</sup>

Article 3 affirms the desire to incorporate and embrace the diversity of its citizens and their traditions. Given that nomadism is acknowledged as a tradition of the Irish traveller, it would be anathema to the Constitution to eliminate the possibility of the Irish Traveller living a peripatetic existence.

In recent years there are a number of legislative initiatives which have been introduced by Acts of the Oireachtas which impact on the possibility of pursuing a nomadic lifestyle. Binchy & Byrne (2002) provide an in-

depth analysis of a number of these and of the constitutionality of such legislation, examined on a number of levels.<sup>2</sup> The Act of primary concern is the Housing (Miscellaneous Provisions) Act 2002, and is particularly relevant when examined in Conjunction with the Equal Status Act 2000, the Roads Act 1993, and the Housing (Traveller Accommodation) Act 1998.<sup>3</sup>

The 1998 Act was viewed as a progressive step in recognising the rights of Travellers, as it empowered Local Authorities to provide housing and halting sites for Irish Travellers. However, the Act did not statutorily oblige Local Authorities to provide housing. The Act obliged each Local Authority to draw up a 5 year Traveller Accommodation Programmes (TAPs) with no sanction for the Local Authorities if the Accommodation Plans are not implemented.<sup>4</sup> The Act also established the National Traveller Accommodation Consultative Committee (NTACC) as well as Local Traveller Accommodation Consultative Committees (LTACC).<sup>5</sup> These are committees, consisting of members of the Travelling and sedentary community to engage in the process of developing the Local Authority Traveller accommodation strategies. However, these Committees are given no power of enforcement or influence when it comes to designing the TAP.<sup>6</sup>

The failure of the Local Authorities to provide Traveller Accommodation resulted in large scale encampments, such as at the Dodder River in Rathfarnham, which created a number of problems, as the sites of the large encampments, did not have the services or the amenities suitable for such large numbers of people.<sup>7</sup> The levels of undisposed waste increased, and the site became an eyesore in the eyes of the surrounding community. In the run up to the 2002 General Election, a new Act was rushed through the Oireachtas. This was the Housing (Miscellaneous Provisions) Act 2002. Section 24 of this Act adds a new section, Part IIA, to the Criminal Justice Act 1994, consisting of 8 sections, 19A-19G. While all sections are relevant, Section 19C is most relevant to this discussion. Section 19C states:

- “(1) A person, without the duly given consent of the owner, shall not—
- (a) enter and occupy any land, or
  - (b) bring onto or place on any land any object, where such entry or occupation or the bringing onto or placing on the land of such object is **likely** to—
    - (i) **substantially** damage the land,
    - (ii) substantially and prejudicially **affect** any amenity in respect of the land,

- (iii) prevent persons **entitled** to use the land or any **amenity** in respect of the land from making reasonable use of the land or amenity,
  - (iv) otherwise render the land or any **amenity** in respect of the land, or the lawful use of the land or any amenity in respect of the land, **unsanitary** or **unsafe**,
  - (v) **substantially interfere** with the land, any amenity in respect of the land, the lawful use of the land or any amenity in respect of the land.
- (2) A person who contravenes subsection (1) shall be guilty of an offence.”

This Section, coupled with the Roads Act 1993, Section 69(1) which states:

- “(a) Any person who without lawful authority erects, places or retains a temporary dwelling on a national road, motorway, busway or protected road shall be guilty of an offence.
- (b) Any person who without lawful authority or the consent of a road authority erects, places or retains a temporary dwelling on any other prescribed road or prescribed class, subclass or type of road shall be guilty of an offence”

effectively renders nomadic movement impossible save where there are authorized Local Authority halting sites or private lands where the owners have agreed to allow an encampment. Considering the failure of Local Authorities to provide the level of Traveller Accommodation required, the possibilities of pursuing a nomadic lifestyle have become very limited with the introduction of the 2002 Act

At the same time, when Local Authorities are willing to provide accommodation, there is a clear preference on behalf of the Local Authorities for the provision of ‘bricks and mortar’ housing rather than halting sites.<sup>8</sup> Of the 3,100 accommodations sought by the Report of the Task Force on the Travelling Community (the task force contained no members of the Travelling community), based on the requirements of transient Travellers, 2,200 were recommended to be halting bays. By 2001, 642 standard houses had been provided and only 129 halting sites.<sup>9</sup> As Crowley states “Travellers now have nowhere to camp legally (except for a handful of transient sites), and moving from one camp to another involves nothing more liberating than moving from one criminal trespass charge to another.”<sup>10</sup>

The Housing (Miscellaneous Provisions) Act 2002 renders trespass a criminal rather than a civil offence.<sup>11</sup> It gives increasing powers to the

Gardaí to remove objects brought onto land and to dispose of these if they are not reclaimed within a month.<sup>12</sup> It also gives Gardaí powers of arrest and imprisonment for trespass.<sup>13</sup> Binchy questions the Constitutionality of Section 19C with respect to Article 38(1) of the constitution.<sup>14</sup>

Article 38(1) of the Irish Constitution states:

“No person shall be tried on any criminal charge save in due course of law.”<sup>15</sup>

The wording and interpretation of the Act renders one unsure as to when one is committing a criminal offence. The use, in the 2002 Act, of the words ‘likely’, ‘interfere’, ‘substantially’, ‘damage’, and ‘entitled’ as the basis of a criminal charge leave the potential offender uncertain as to when a criminal offence will be committed. A potential trespasser cannot be sure what is to be interpreted as a ‘likelihood’ of damage, what constitute ‘interference’ with the land on which (s)he is trespassing, whether this is considered to be ‘substantial’, what are considered to be the ‘amenities’ one is interfering with, and, who is ‘entitled’ to use the land. For example, in line with the law of the land, placing a caravan on any land could interfere with emergency services if they required access to the land in carrying out their duties, which they are entitled to do. Binchy states there are two reasons why crimes that are too vaguely defined are unconstitutional.

“The first is that fail to give a citizen adequate notice of what kind of conduct will render them liable to prosecution...The second reason is that vaguely defined crimes can lead to arbitrary and discriminatory enforcement.”<sup>16</sup>

Also, the Act places the burden of proof of consent to use the land on the accused, which is unusual, though not unprecedented, in law.<sup>17</sup> The Act focuses on creating a criminal offence from a likelihood, or a possibility, of an act (damage, interference) being committed. In law, an action in itself has to be associated with likelihood of damage.

“The overwhelming majority of serious offences requires proof of intent or recklessness and of actual injury or damage...He or she is being exposed to such punishment for *having* done something, namely, acting in a manner that contains (arguably) a socially unacceptable risk of damage or injury.”<sup>18</sup>