

Incota est

About European Citizenship

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Kees Groenendijk, to whom these few lines are dedicated, did much pertinent work and writing on the notion of nationality as well as on its complement, the notion of foreigner.¹ The foreigner is in fact, by definition, the opposite of the national. Kees Groenendijk's intelligence, his concern for anchoring law in its sociological reality, will lead to setting aside this binary logic of outside or inside, of national or foreigner, of white or black. He showed that, little by little, "the gap between 'us' and 'them' [is] bridged".² The present contribution simply attempts, as a tribute to Kees Groenendijk, to extend his reflection by contemplating a possible future of a European citizenship of residence (II), based on the ancient notion of Roman law, the *incota* (I).

I. The *Incota*

The word *incota* comes from the Latin verb *incolare*, to live in, to inhabit. It thus designates the inhabitant: *Incota est qui aliquid regione domicilium suum contulit*.³ In his *Roman History*, Theodor Mommsen, the great German historian of Antiquity, gives a good description of how Rome as well as, he adds, all Nations, was built gradually by the integration of various populations, and how at a certain point, "next to Roman citizens a new community of inhabitants was founded".⁴ Shortly after Mommsen, the French academics Daremberg and Saglio published their *Dictionnaire des antiquités grecques et romaines*. They underline that the word *incota* in Latin (*incolat* in French) "means, in Roman public law, the member of a city or commune who, without belonging to it through origin or filiation, belongs to the community by establishing residence".⁵ In other words, the inhabitants (*incolae*) are similar to natives (*originarii*), with whom they share almost the same rights, contrary to foreigners passing through (*peregrini*). Later, after the evolution of the Germanic empire, the same concept of *incota* was used in the Bohemian Kingdom. The *incota* right was thus described, in 1751 in the Diderot and d'Alembert Encyclopedia: "that is how they call, in Bohemia, a right given by the king to foreigners who are not born in the kingdom, and which allows them to benefit from the same prerogatives as the other citizens".⁶ It is interesting to note that, beyond this

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¹ See among others Bauböck, Ersbøll, Groenendijk & Waldrach 2006.

² Groenendijk 2006a, p. 97.

³ Vichniac 1933, p. 218; Prudhon 1809, p. 89.

⁴ Mommsen 1857.

⁵ Daremberg 1877.

⁶ Diderot & d'Alembert 1751, v^o *Incolat*.

definition, the encyclopaedists of the Age of the Enlightenment (*les lumières, Aufklärung*) add that “men must be seen as the greatest wealth of a State, princes are interested in attracting them, and the status of foreigner should never exclude the individual from advantages in any society”.

Today, the concept of *incola* has totally disappeared from dictionaries, from language as well as juridical dictionaries. It has also disappeared from law books and can only be found in relatively ancient works.⁷

Would it be impossible to update the *incola* concept and relate it to the situation of Third Country Nationals who are long term residents in the European Union? Although care should always be taken in making historical comparisons, and one should be aware that it is rather a parallel between similar situations, made a posteriori, one might be able to risk making some parallels with European citizenship. Alfons Matera and the judge Pescatore had already substituted “civis europaeus sum” for “civis romanus sum”.⁸ This European citizenship, as the Roman citizenship with the *incola*, seems to extend more and more today to persons residing on the territory of the European Union.

II. The European citizenship

It is in a Dutch case, the famous *Van Gend and Loos* judgment, that the European Court of Justice uses, in the French version, the concept of citizenship for the first time.⁹ The case does not concern a natural person, but rather a company who considered it was the victim of a new import tax contrary to Community law when the Netherlands changed the classification of a product used in the glue manufactured by this company. The change in qualification led, in fact, to a higher customs tax. In order to avoid censure by the Court, the Netherlands put forward that without secondary legislation, the Treaty of Rome establishing the European Economic Community only concerns States and cannot give rights to individuals. The main paragraph is well known and reads as follows:

“The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.”

It is less known that, although the English version uses the word “nationals”, the Dutch version the word “onderdanen” (closer to the word “subjects”) the German version the word “einzelnen” (“individuals”), the French version, which was the original version of the judgment, uses the word “citoyens” (“citizens”). Of course, in this case it refers to citizens of Member States, and not yet to European citizens, the most important being the statement that not only the State, but the person, would directly draw rights from the Treaty. However, this first use of the word citizen and its context of recognition of a “new legal order of international law”, different from classical international

7 Prudhon 1809.

8 Matera 1998.

9 ECJ, case 26/62, *Van Gend and Loos* [1962] E.C.R. 1963.

law treaties, opens to the recognition of a new juridical and political entity in which citizenship could also be enlarged. It is only twenty years later, in 1984, that the European Council of Fontainebleau created a “Europe of citizens” Committee, and close to another ten years later, in 1992 and in the Netherlands again, in Maastricht, that European citizenship was included in the Treaty. The definition is limited: “Every person holding the nationality of a Member State shall be a citizen of the Union” (art. 17 EC). However, this citizenship will be subjected to a double enlargement movement: enlargement of its scope *ratione materiae* and enlargement of its scope *ratione personae*.

Initially, the rights of citizens are mainly linked to freedom of movement of economic agents. It is mainly as a worker that a person will benefit from rights connected to free movement (art. 39 ss EC). It is thus mainly economic and social rights linked to exercising a job. It is also in this frame that the first enlargements of the personal scope will be made. Secondary legislation texts, and even more so case law, will recognize anticipatory rights to future workers such as job seekers or students, posterior rights to the ancient workers such as pensioners and, on the side, to family members of the worker even if they are not employed and whatever their nationality. We can already see here a first enlargement to third country nationals, found in secondary legislation as early as 1968, through the right to family reunion for members of the worker’s family, whatever their nationality, if the worker is a citizen of a Member State who is using free movement.

However, in another Dutch case, *Morson and Jhanjan* in 1982, the ECJ will refuse to condemn reverse discrimination. Mrs Morson and Mrs Jhanjan, who are nationals of Surinam, do not find in EC law a right to reside with their daughter and son, who are Netherlands nationals of whom they are dependants, simply because these Netherlands nationals did not use free movement and “have never been employed in another Member State”.¹⁰ It is interesting to read again, twenty-five years later, an extract of the opinion of Advocate General Sir Gordon Slynn:

“This, it is said, causes incongruous results if a non-national can come in with his family, or if, as the Commission contends, a national can come back with his family, but a national cannot bring in his family to join him in the place where he has always been. Since the rights conferred derive from the principle of a freedom of movement for workers, and not from a right of residence, throughout the Community, gaps in the right of a family to live with an individual are at the least possible and perhaps inevitable”.¹¹

One may ask if this should still be so today when each citizen has “a right of residence throughout the Community”. However, even when national courts did ask the ECJ to move on and to condemn reverse discrimination on the basis of equality for all European citizens, the Court refused, noting “that citizenship of the Union ... is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law”.¹² The ECJ will accept that nationality of

10 ECJ, case 35 and 36/82, *Morson and Jhanjan* [1982], E.C.R. 3723, para. 2.

11 Opinion delivered on 6 October 1982, para. 2.

12 ECJ, case C-64/96 and C-65/96, *Uecker and Jacquet* [1997], E.C.R. I-3171, para. 23.

another Member State is a sufficient link with Community law even if there is no physical movement of crossing a border but just a sort of virtual movement through nationality.¹³ If, to a certain extent, the scope ratione materiae of the European citizenship remains limited, the scope ratione personae benefited from other enlargements.

Other enlargements will follow through freedom of provision of services for European companies that can use third country national workers, or for certain rights linked to the labour market, through association agreements, mainly association agreements with Turkey on which Kees Groenendijk did a lot of work, or for rights linked to the principle of equality in cooperation agreements, namely with North Africa.¹⁴

Beyond these gradual enlargements, it is the conjunction of citizenship and equality that will clearly mark both the extension of the material scope of recognized rights and the difficulty in identifying the personal scope of this citizenship. Concerning the material scope, for the first time in 2001 in the *Grzelczyk* case, the Court states that “Union citizenship is destined to be the fundamental status of nationals of the Member States”, with the principle of equality as its corollary, so that this citizenship is “enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality”.¹⁵ On this basis, social rights which are not connected to work are recognized through citizenship: social aid (*Grzelczyk, Trojani, D'Hoop*) or scholarship (*Bidar*).¹⁶ Of course, the Court does not draw an absolute equality of rights principle from citizenship. On the one hand, this must be in the material scope of the Treaty. But the interpretation of this scope is broad, and even includes a civil right such as the right to a name (*Garcia Avello*).¹⁷ On the other hand, there must be a “real link” between the citizen and the State that must recognize rights (*D'Hoop*), so that sometimes this right is refused by the Court, considering that the State correctly appreciates the absence of a sufficient real link (*Collins, De Cuyper*).¹⁸ We are then in a case-by-case interpretation, *in concreto*, of which it is difficult to draw guidelines.¹⁹ Frequently, this “real link”, this proximity condition, is expressed by long-term residence. The “citizens” directive 2004/38, by creating “the right of permanent residence” seems to set this real link at five years residence.²⁰ Some previous case law had already accepted a shorter duration of three years (*Bidar*).

As soon as equality and proximity become essential criteria to benefit from rights connected to European citizenship, we can understand how difficult it is to determine the personal scope of this citizenship. How can Third Country Nationals who are long-

13 ECJ, case C-148/02, *Garcia Avello* [2003], E.C.R. I-11613, para. 27; case 200/02, *Chen* [2004], E.C.R. I-9925, para. 19.

14 See Carlier 2007, p. 41 ff.

15 ECJ, case C-184/99, *Grzelczyk* [2001] E.C.R. I-6194, para. 31.

16 ECJ, case C-456/02, *Trojani* [2004] E.C.R. I-7573; case C-224/98, *D'Hoop* [2002] E.C.R. I-6191; case C-209/03 *Bidar* [2005] E.C.R. I-2119.

17 ECJ, case C-148/02, *Garcia Avello* [2003] E.C.R. I-11613.

18 ECJ, case C-138/02, *Collins* [2004] E.C.R. I-2703; case C-406/04, *De Cuyper* [2006] E.C.R. I-6947.

19 Martin 2006.

20 Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ L* 158, p. 77-123, corrigendum *OJ L* 229, p. 35-48.

term residents still be excluded? On the one hand, the equality principle is also affirmed in the fundamental rights texts. In another European context, the European Court of Human Rights also tends to extend the material scope of this equality principle, even if it has to be accessory to a right recognized by the European Convention on Human Rights (following the present art. 14 ECHR, but not in the future following protocol n° 12). Thus the Court includes in the right of property, contributory social rights such as unemployment benefits (*Gaygusuz*) or non-contributory social rights such as disability allowance (*Koua Poirrez*), and will apply the non-discrimination principle forbidding that a foreigner be refused such rights that would be reserved to nationals and to European citizens.²¹ On the other hand, the proximity principle is often better respected by long-term resident Third Country Nationals than by European citizens. For example, a Turkish worker will often have a longer period of residence in the Netherlands than a French worker. In the same way, a Commonwealth citizen will have, in the United Kingdom, a residence period as long as, or even longer than, that of numerous European citizens of other Member States. This is why, causing general astonishment, the Court stated that even the right to vote in European elections was not necessarily reserved to European citizens only. Thus the United Kingdom may, in its legislation concerning European elections, extend the right to vote beyond European citizens, to Commonwealth citizens meeting certain criteria (Qualifying Commonwealth Citizen).²² The connection with fundamental rights and with the principle of proximity is clear. Concerning fundamental rights, it is after being sentenced by the European Court of Human Rights, because it had not organized European elections in Gibraltar (*Matthews*), that the United Kingdom decided to organize these elections and to extend the right to vote to Commonwealth citizens, obviously so as to maintain an English-speaking domination in Gibraltar.²³ Concerning the principle of proximity, the ECJ specifies that enlargement of the right to vote to other beneficiaries than European citizens must be limited “to certain persons who have close links” to the State (*Spain v. UK*, para. 78). On the same day, in the *Eman* case concerning the right to vote refused by the Netherlands to its own nationals residing in Aruba, the Court specifies the link between proximity and equality.²⁴ The residence criteria, in this case in the Netherlands to benefit from the right to vote, can be an acceptable proximity criterion if it does not affect the equality principle. However, in this case, it is discriminatory in so far as other Dutch nationals who do not reside in the Netherlands have this right to vote.

“In that regard, the objective pursued by the Netherlands legislature consisting in the conferment of the right to vote and stand for election on Netherlands nationals who have or have had links with the Netherlands falls within that legislature’s discretion as regards the holding of the elections. However, the Netherlands government has not sufficiently demonstrated that the difference in treatment observed between Netherlands nationals resident in a non-member country and those resident in the

21 E.Ct.H.R., *Gaygusuz* [1996]; *Koua Poirrez* [2003].

22 ECJ, case C-145/04, *Spain v. U.K.*, [2006] E.C.R. 7917

23 E.Ct.H.R., *Matthews* [1999].

24 ECJ, case C-300/04, *Eman* [2006] E.C.R. 8055. See for comments on other points also, K. Groenendijk (2006b).

Netherlands Antilles or Aruba is objectively justified and does not therefore constitute an infringement of the principle of equal treatment" (*Eman*, para. 60).

It can thus be seen that it is a delicate task to apply the combination of the principles of equality and proximity to European citizenship. At least, it leads to putting into perspective rights exclusively reserved to the citizen. In this sense, the Court completes the *Grzelczyk* statement, adding that

"Moreover, while citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality ... that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union" (*Spain v. UK*, para. 74).

One may say, with Kees Groenendijk, that in those two cases the Court gave a broad interpretation of the notion "the peoples of the States" included in articles 189 and 190 EC, saying that the "European Parliament ... shall consist of representatives of the people of the States".²⁵ Extension of recognised rights to Third Country Nationals who are long-term residents is confirmed by Directive 2003/109.²⁶ According to the second consideration of the preamble, the directive follows the objective of the 1999 European Council in Tampere "that the legal status of third-country nationals should be approximated to that of Member State's nationals and that a person who has resided legally in a Member State for a period of time to be determined [it is 5 years] and who holds a long term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union". This evolution brings together the rights recognised to the European citizen and those recognised to the long-term resident Third Country National. Even if "the gap between us and them" is not fully "bridged", I agree with Kees Groenendijk's opinion on the subject. Contrary to what could have been feared, the creation of a European citizenship has rather reinforced the rights of the long-term resident foreigner, through a sort of ratchet effect.²⁷ However, it is still legitimate to extend the question of "what" to the question of "who".²⁸ Like the extension of the notion of "the people of the States", isn't it time to move to an extension of the notion of "citizen of the EU"? If the rights of citizens and long-term resident foreigners are similar, wouldn't it be simpler to integrate the latter into European citizenship and to define it as follows: "A European citizen is any person legally residing for more than five years on the territory of the European Union"? Legally, this definition is clearer. On the one hand, it becomes an autonomous Community concept since European citizenship does not depend on the nationality law of each Member State any more. On the other hand, this definition facilitates the simultaneous, and difficult at the present time, interpreta-

25 K. Groenendijk (2006b): "Het Hof kiest op het niveau van de Unie voor een duidelijk ... open benadering van ... het begrip volkeren".

26 Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *OJ L16*, p. 44.

27 Groenendijk 2006a.

28 Guild 2004.

tion of the principles of proximity and equality. Politically, this definition also allows to revitalise European citizenship by giving it its own content and by associating every person participating in the building of the European Union. Politically, however, it must realistically be admitted that the general trend is closer to a nationalistic withdrawal than to an opening of European citizenship to long-term resident Third Country Nationals. As such, however, as Kees Groenendijk noted, this simple expression “long-term resident Third Country National” is less negative than that of foreigner who, even if he is not the stranger, is still the negative form of national.²⁹ The problem with this expression, that is a circumlocution, is its length: “long-term resident Third Country National”. Going back to Thomas Hammar and John Locke’s expression, Kees Groenendijk had called these long-term resident Third Country Nationals: “denizen”. These are between citizens and foreigners.³⁰ The word *incola* could also be used. Drawing a common source in Latin and in Roman law, it has the advantage of reminding that, through time, Europe was built by integration of various migrations. If a new definition of citizenship through a five-year residence is not created, *incola* would be the expression of a citizenship that would progressively enlarge to all long-term residents. It is the progressive building of a residence citizenship. *Incola est.*

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29 Groenendijk 2006a, p. 100.

30 Groenendijk 1996, p. 9.

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