

CITIZEN RIGHTS

POLICY GAPS REVIEW

European Alternatives (EA) is a transnational civil society organisation and citizen movement promoting democracy, equality and culture beyond the nation state.

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- > Centro di eccellenza Altiero Spinelli
- > Consiglio Nazionale delle Ricerche
- > European Civic Forum
- > Insitutul European din Româna



Consiglio Nazionale delle Ricerche
Istituto di Ricerche sulla Popolazione e le Politiche Sociali



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SUMMARY

Throughout 2015-2016, European Alternatives, the Italian National Research Council, European Institute Romania, the University of Roma Tre and European Civic Forum looked into how and where citizen rights are being protected in the EU and where protection is lacking.

This research resulted in the development of a number of case studies that analyse different areas of EU law and cases that have been brought by citizens and non-citizens to claim their rights. These cases cover areas from citizenship, to privacy rights, migration and discrimination.

This Policy Gaps Review aims to summarise the results of this research and identify some key areas where gaps exist and the EU could take action. This work informs our policy report – *A state of democracy: towards citizen rights protection in the EU* - and is the result of our case study analysis report of this project – *Citizen rights: Case study compilation*.

This review covers the following areas:

- Citizenship
- Discrimination
- Movement rights
- Privacy rights

The findings of this report indicate that large gaps and inconsistencies exist in several policy areas, which results in patchy protection of rights for persons living in the EU. A first step to remedy this situation is outlined in our policy report, however what is clear is that concerted action is needed to close these gaps in order to actualize European citizenship and rights.

Important and overarching all of these areas and therefore the focus of our policy report is the lack of effective mechanisms for the EU to intervene when fundamental rights are threatened by Member States. The current reliance on Article 7 and the pre-Article 7 Rule of Law Framework, alongside the Council's Annual Rule of Law Dialogue, means that in many instances people are forced to resort to the courts to protect their rights due to the inability or unwillingness of EU institutions to react.

This is not only problematic as long as legal aid is not available automatically for cases involving EU rights, but also as the Court of Justice does not have competence to act on fundamental rights violations *per se* and without another EU right or action being involved. This means that citizens are forced to resort to the European Court of Human Rights if national courts fail, which can only act on a portion of the rights contained in the EU's Charter of Fundamental Rights and does not have the speedier referral procedure provided by the Court of Justice.

CITIZENSHIP

Since 1993 every citizen of an EU Member State is also considered a citizen of the Union. This citizenship is provided directly via the Treaty on the Functioning of the European Union and is additional – EU citizenship does not replace national citizenship. EU citizenship does however confer a number of rights, including:

- the right to move and reside freely within the Union;
- the right to vote and to stand as candidate in elections to the European Parliament and in municipal elections in the Member State of residence;
- the right to consular protection from the embassy of another EU member state, when outside the EU;
- the right to petition the European Parliament, to apply to the European Ombudsman, and to address the EU institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

The case studies and research completed as part of this project have shown however that European citizenship currently exists somewhere between the envisioned complementary citizenship and an actual citizenship. The results of this are a number of inconsistencies and gaps in law and practice that need clarification.

Unclear voting rights and inequality between non-citizens and citizens in the right to vote

Two cases looked at in this project - C-145/04 Kingdom of Spain v United Kingdom and C-300/04 M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag – exemplify the issues and gaps the EU is currently dealing with regarding citizenship. Both cases, decided by the ECJ in 2006, but still valid today, confirm that the concept of EU citizenship is one defined by national rules and procedures when it comes to voting rights, but also one that must sit within the framework of EU rules.

On the one hand, in the first case, the Court of Justice decided that the UK's national rules on the right to vote in European Parliament elections were in compliance with EU law, even though they extended the right to vote to persons without European citizenship, who were also not resident in the EU. On the other, in the second case, the Court decided that the Netherlands' restriction on the right to vote of EU citizens non-resident in the EU was unlawful.

These cases show that a clear policy gap exists in defining and tying European citizenship to political rights. The scope provided in United Kingdom v Spain case both opens the door to delinking political rights from citizenship and residency, but also to large differences in political rights between Member States: with non-nationals having the right to vote in EU elections in some member states, while in others not.

Statelessness

As mentioned above, European Union citizenship is complementary and does not replace national citizenship. However, that does not mean that loss of national citizenship automatically entails loss of Union citizenship and in some cases, Union citizenship can prevent Member States from withdrawing national citizenship.

This was the situation in a case looked at for this project – *C135/08 Rottmann v Freistaat Bayern* – where the Court of Justice set out criteria for the loss of national citizenship when the person would also lose European Union citizenship, thereby restricting the right of member states to decide on loss of citizenship.

The question of stateless persons in Latvia and Estonia, amongst others, is an open question and another case examined for this project. While non-passport holders have gained rights due to recognition of long-term resident status, they do not have the full political rights given to EU citizens.

At the same time, as reported by the European Network on Statelessness, many Member States do not have national policies on statelessness.¹

As an area with clear implications on EU law, the lack of a common European policy on stateless persons within the EU and on loss of citizenship resulting in statelessness is a clear gap that should be filled to harmonise policy across Member States.

DIGITAL PRIVACY

The right to privacy and the right to data protection are protected under the EU's Charter of Fundamental Rights in Articles 7 and 8 respectively. The right to a private life is also protected in the European space and in all EU countries under Article 8 of the European Convention on Human Rights. Data protection is regulated throughout the EU under the Data Protection directive, passed in 1995, which required EU member states to pass national laws on data protection.

A recent, substantive development in digital privacy protection was analysed as part of a case study in this topic – that of the right to be forgotten, as developed by the Court of Justice in case *C-131/12 Google Spain and Google Inc. v. AEPD & Mario Costeja González*. This case crucially extended digital privacy to include a right to delisting from search engines when the information is inadequate, irrelevant or no longer relevant, or excessive. However, much of the ruling was unclear and key issues that need to be addressed to ensure that this is an effective right include:

- The obligations of search engines and intermediaries other than Google. This includes defining what exactly constitutes a “search engine”. While Google currently controls almost 90% of the market for search operators, the ruling is sufficiently broad that it could affect other smaller companies, sometimes with a more specialized search focus, who have fewer resources to deal with the “right to be forgotten”.
- Similarly, the ruling asserts that the “right to be forgotten” may be limited “according to the role played by the data subject in public life,” but this boundary between a public and private figure is difficult to ascertain.
- The onus of deciding, which currently has been placed onto the search engines – in effect asking private companies to balance between freedom of information and the right to a private life. This is a substantial

¹ <http://www.statelessness.eu/law-policy>

change in rights adjudication and, if left in place, needs regulations and guidelines to ensure that private companies balance rights effectively.

These open issues on an area of life increasingly important to European citizens requires a coherent and harmonised solution.

There is therefore a clear need for European level policy to clarify the issues and put in place mechanisms and procedures to ensure that this right is effectively realised.

DISCRIMINATION

The Charter of Fundamental Rights and the Directive 2000/78 explicitly prohibit discrimination on a number of grounds within the EU. This is an area where, throughout the research, a clear need for policy intervention was identified, one highlighted already by moves to introduce the 2008 proposed directive against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

Emphasized by the research was the need for policy intervention going beyond legislation. The issues raised in the cases examined in this field were broad, but often came back to the point that even where laws protected ethnic, sexual and identity-minorities, discrimination often occurred in practice.

The case studies looked at included cases of potential forced sterilization of Roma, discrimination based on sexual orientation in recruitment and asylum policy and sexual orientation. While in all three cases EU legislation was able to address the discrimination that occurred, identifiable was that these situations arose due to a lack of policies designed to counter-discrimination at the national level. For example, in the case of *V.C. v. Slovakia*, which was heard at the ECtHR due to a lack of Court of Justice competence as no direct EU right was involved, the court was unable to assess if discrimination had occurred due to a lack of statistics kept on sterilization of Roma women, despite ongoing claims of forced sterilization, while in the *Accept* case C-18/12, national institutions had failed to react to a case of discrimination in recruitment.

Beyond this and highlighted in the case studies, statistics from the Fundamental Rights Agency continue to show the gap in protection in practice, with high numbers of minorities facing discrimination in practice even where laws are in place.

Addressing these issues requires further European policy that includes and goes beyond introducing new directives against discrimination. EU level policies should proactively monitor discrimination across the EU and include mechanisms to react and sanction at an EU level to discrimination in Member States.

MOVEMENT RIGHTS

Movement of persons in terms of the EU covers a large number of areas of competence, from freedom of movement of EU citizens to the Common European Asylum Policy.

Movement and in particular movement into the EU from persons without the passport of an EU member state include a large number of areas identified by the research for policy improvement in order to comply with existing EU rules and, in particular, the Charter of Fundamental Rights.

Language tests

Language and civic integration tests were one area highlighted by the research for improvements in policy. In particular, the research suggested that civic and language testing as selective measures of integration should not be applied in EU member states. Analysis in the research argues that these tests, applied by some Member States as a requirement for visa and/or residency rights do not further the proper aims of integration, conflict with fundamental rights to family life and non-discrimination, and do not take into due consideration the proportionality principle required for the adoption of these selective measures.

It recommended that language and civic education be encouraged as measures to promote integration, but not as requirements for immigration status and that EU level policy should be developed to support this.

Asylum

A clear policy issue that came out through the research was the vast disparities that exist amongst EU member states on asylum acceptance rates, including large variations between asylum acceptance rates from persons from the same country of origin among member states. Specifically in terms of asylum seekers applying on the grounds of sexual orientation and gender identity, research highlighted the need for both harmonised interpretation and application of asylum policy and sensitivity training on this topic for persons across the EU assessing on asylum

seekers on these grounds. In building a Common European Asylum System these large differences represent a large failure in policy coordination amongst Member States, with Member States clearly interpreting the Qualification Directive differently from each other.

One solution proposed to address this gap and also to address concerns from Member States over accepting asylum seekers in the research would be to commonly assess asylum applications at the EU level and grant asylum seekers temporary EU citizenship upon acceptance, providing them with some of the rights and duties attached to EU citizenship and allowing refugees to move within the EU for work and education.



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