

On the relevance of citizenship in criminal law: Implications for proportionality, equality, and justice

KATJA FRANKO*

Abstract

This article addresses the relevance of citizenship in criminal law and criminal justice and its consequences in terms of producing disparate rationalities, outcomes and systems of rights. Although seldom addressed in scholarly writing and textbooks, offenders' formal membership status has profound consequences for the state's sanctioning practices. The article first broadly outlines the developments that have in recent years made issues of membership more relevant to criminal justice practice. By examining a recent judgement by the Supreme Court of Norway, and drawing on the ECtHR jurisprudence, the article then proceeds to discuss the legal and normative implications of membership status for criminal law and the unequal criminal justice outcomes. It concludes that due to its silence on, and lack of awareness of, the relevance of citizenship, criminal law runs an inherent risk of inequality and disproportional treatment that is built into its very structure. Although considered normal and legitimate in current legal doctrine and everyday practice, this approach raises a question about the law's ability to adapt to social change and to maintain its commitment to equality as a normative ideal.

* Katja Franko is Professor of Criminology at the University of Oslo, Norway. She has published extensively on globalization, criminalisation, migration and border control. Her recent publications include *Victimhood, Memory, and Consumerism: Profiting from Pablo* (with D.R. Goyes, Oxford University Press, 2023), *Globalization and Crime* (3rd edition, 2020, Sage) and *The Crimmigrant Other: Migration and Penal Power* (2020, Routledge). The author would like to thank Hanna Buer Haddeland, Jørn Jacobsen and an anonymous reviewer of this journal for their helpful comments on earlier drafts, and to Nora Hahn and Siri Sandberg for their editorial assistance. Translations of Norwegian sources in the article are mine.

How does *who you are* matter for how you are punished and what kind of sanctions are imposed as a consequence of your infractions of criminal law? Normative theories of criminal law have a long-standing concern with how offenders' personal and social circumstances should inform sentencing and proper aims of punishment. The perennial balancing act between adjusting punishments, on the one hand, to individual characteristics of offenders and, on the other hand, to the objectives of sentencing consistency, is further compounded by the growing awareness of the need to combat prejudices in terms of racial and socio-economic background. However, *who you are* matters in criminal law not only in terms of actual personal and socio-economic differences among offenders but, importantly, it matters in a formal sense. Although seldom addressed in scholarly writing and textbooks, offenders' formal membership status (i.e. whether he or she is a citizen or an alien) has profound consequences for the state's sanctioning practices. This article addresses the relevance of citizenship and membership status in criminal law and criminal justice and its consequences in terms of producing disparate rationalities, outcomes and systems of rights. It draws on the growing body of scholarship about the blurring boundaries between criminal law and civil law, and the transformation of criminal justice due to growing salience of immigration control objectives. The article aims to contribute to a conversation on the relevance of membership in criminal law, which is particularly ripe in Norway due to a number of social developments that have been taking place in the country in the past decade and more.

The article first broadly outlines the theoretical intersections of criminal justice and citizenship and then proceeds to present several developments that have, in recent years, made issues of membership more relevant to criminal justice practice. By examining a recent judgement by the Supreme Court of Norway, and drawing on the ECtHR jurisprudence, the article discusses the legal and normative implications of membership status for criminal law and for the unequal criminal justice outcomes. It argues that questions of membership present a normative problem for criminal law and have profound implications for principles of equality and proportionality that have, so far, not been properly addressed. Due to the silence on, and lack of awareness of, the relevance of citizenship, criminal law runs an inherent risk of inequality and disproportional treatment that is built into its very structure. Although considered normal and legitimate in current legal doctrine and everyday practices, this approach raises a question about the law's ability to adapt to social change and to maintain its commitment to equality as a normative ideal.

1. On the relevance of membership for criminal justice

In a seminal article ‘Is the criminal law only for citizens?’, Lucia Zedner points out that citizenship is central in explaining the obligations that individuals owe under the criminal law and in grounding the obligations that the state owes to the accused.¹ It is, therefore, relevant to ask, as Zedner does, to what extent is criminal law predicated on the figure of the citizen. Antony Duff makes a similar point when he suggests that *prior* to normative theorising about the proper aims and scope of criminal law another question should be asked, namely, ‘who is criminal law for?’² As a subscriber to the republican conception of criminal law ‘as a law that citizens impose on themselves’, Duff answers, unequivocally, that criminal law is addressed to citizens.³ In Duff’s account,

*it is the citizen to whom the criminal law speaks, it is the community of citizens by whom the defendant is called to account, and it is the community in answer to whom the offender owes penance for breaching the criminal law.*⁴

This approach is grounded in a long tradition of liberal and Enlightenment thinking where individuals’ contractual and civic obligations to the state, and the state’s obligations to them, are grounded in their position as citizens. This position is, as John Rawls argues in his influential *A Theory of Justice*, ‘defined by the rights and liberties required by the principle of equal liberty and the principle of fair equality of opportunity’.⁵ The assumption that criminal law is grounded in citizenship is for most normative theorists and practitioners taken as self-evident to the extent that it needs no mention. The assumption is built not only on a particular normative and philosophical outlook but, crucially, also defined by questions of jurisdiction. Criminal law is, as Zedner points out, ‘an inherently bounded entity’, as are the bases of its authority.⁶

Consequently, questions of membership and membership status have been mostly overlooked and are seldom questioned in most scholarly perspectives on criminal law. In this framing, described by Nancy Fraser as ‘normal justice’, criminal justice is imagined territorially, as a domestic relation between fellow citizens where ‘parties frame their disputes as matters internal to territorial states, thereby equating the ‘who of justice’ with the citizenry of a bounded polity’.⁷ Within the framework of normal justice, membership status and the position of the non-citizen is obscured from view.

1 Zedner (2013).

2 Duff (2010) p. 300.

3 Duff (2010) p. 293.

4 Zedner (2013) p. 44.

5 Rawls (1971/1999) p. 82.

6 Zedner (2013) pp. 42-43.

7 Fraser (2008) p. 54.

As Fraser points out in her critique of Rawls, *A Theory of Justice* is built on a notion of a self-sufficient and closed society, 'which one entered only by birth and exited only by death'.⁸

Critical observers have pointed out though that, historically, the modern liberal understanding of punishment has been marked by several glaring inconsistencies and blind spots. The abstract category of the citizen has been constituted through the exclusion of 'the other' that has been variously defined by gender, property and personal unfreedom. For example, Cesare Beccaria, who has exerted an enormous influence on modern notions of punishment, and whose 'legal formalism was premised on notions of universalism, equality and respect', was nevertheless completely silent on the question of slavery.⁹ While able to forcefully attack and reject the privileges of the aristocracy and notions of natural hierarchy, Beccaria was unable to include the position of the slave into his philosophical framework.¹⁰ One of the foundational texts of the struggle for equality before the law is thus underpinned by silence and exclusion. This example points to the importance of paying attention to the silences within the discourse of equality of citizens. To Beccaria and his contemporaries, it may have seemed natural and legitimate to exclude slavery from the discourse, although a powerful anti-slavery movement was already taking shape at the end of the 18th century. This brings to our attention the importance of critically examining subjects that at a certain point in time seem natural to exclude and irrelevant to the discourse about the normative grounding of criminal law.

The equation of the 'who' of criminal justice with the citizens of the state raises a number of questions that have in recent years become increasingly salient due to international migration and the growing diversity of the population. Transborder movements raise important normative challenges to criminal law. The subject to whom the law speaks can no longer be assumed to be the citizen, nor can it be assumed that he or she shares the same language as the legislator and the courts. This poses a serious challenge to the moral and communicative capacity of the law, including its ability to convey censure as well as general preventive messages. Moreover, the question of the relevance of citizenship for criminal law is particularly relevant to ask in Norway and other Scandinavian countries, where the notion that punishment should have some ulterior inclusionary purpose forms one of the main premises of Scandinavian penalty.¹¹ This notion plays out differently in different national contexts. Social inclusion is nevertheless especially relevant as a justification of punishment and in terms of its execution, not least for the prison as an institution. This is evident in a recent Norwegian White paper which states:

8 Ibid. p. 39.

9 Burgio (2008).

10 Harcourt (2013), Beccaria (1764/2008).

11 Smith and Ugelvik (2017).

The main purpose of punishment and the prison system is, on the one hand, security and protection of the society and, on the other hand, rehabilitation and reintegration.¹² (...) Protection of the society depends upon good rehabilitation and reintegration.¹³

Although Scandinavian countries have in recent years seen a trend towards exclusionary penalties, particularly the growing use of indefinite preventive detention (*forvaring* in Norwegian), social inclusion seems to remain central and has unmistakably positive connotations. As Anderson and Gröning point out, ‘rehabilitation is understood and implemented in relation to crime prevention as the (central) aim of punishment’.¹⁴

However, the purpose of rehabilitation and reintegration begs the question: reintegration into what? In order for this understanding of the purpose of punishment to work, those who are being punished need to be members of a community into which they will be reintegrated. Social inclusion thus presupposes the existence of membership. Yet issues of membership are not explicitly considered in the White paper nor in most other relevant documents, where the implicit understanding is that we are talking about the community of citizens.¹⁵ While issues of membership are seldom explicitly addressed in contemporary theoretical writing about criminal law, we shall see in the next section that rapid changes have been taking place at the level of practice which has been marked by a move from ‘normal’ to ‘abnormal justice’.¹⁶ This mismatch between discourse and practice has created a need for greater normative reflection. Questions such as what kind of community are individuals in question part of, what kind of community will they be included into, and what happens to those who are not members of a community, deserve systematic attention.

2. Why is citizenship relevant to criminal law?

The term citizenship refers to a legal status that confers on a person full rights and responsibilities as a member of a nation and a political community. The term refers, therefore, both to a formal status of membership in a national community and to substantive aspects pertaining to recognition, participation in the political community and equality. When examined within a national frame of understanding citizenship is often understood as ‘a public declaration of equality’ and has universal aspects and

12 «Tilbakeføring» in Norwegian.

13 See, Meld. St. 39 (2020-2021) Kriminalomsorgsmeldingen – fremtidens kriminalomsorg og straffegjennomføring, available at (URL).

14 Anderson and Gröning (2016) p. 222.

15 The afore mentioned White paper on the future of criminal justice and execution of sentence, for example, mentions citizenship only 10 times (usually when referring to foreign citizens) in a document of 100 pages and more than 37.000 words.

16 Zedner (2013), Aas (2014).

aspirations of equality of rights among citizens.¹⁷ Most of political and legal debates in the past century have focused on achieving equality of racial, gender, sexual and other identities in terms of substantive or 'lived citizenship'.¹⁸

However, in the past decades, discussion about formal citizenship rights have also had greater political salience, particularly in countries of the global North. These discussions have brought to the fore the exclusionary aspects of citizenship. As Bosniak points out: 'at some moments and in some settings, universalist norms of citizenship are understood to extend only to those persons who possess status citizenship in the state in question. From this perspective, substantive citizenship is for status citizens only'.¹⁹ The lack of formal citizenship thus means exclusion from the discourse and practices of equality and hence denotes an adverse condition.²⁰

In practical terms, this means that most countries reserve certain rights for formal citizens only. Yet which rights are to be reserved varies greatly. For example, Norway and Denmark have both in the past decade established prisons and prison wings for foreign citizen offenders. However, while Norway has chosen not to formally differentiate between foreign and national offenders in terms of prisoners' access to welfare rights, such as education, work and sport, Denmark gives non-citizens only a limited access to such benefits, following amendments to the 2018 Act on the Execution of Sentences.²¹ The example shows that, when its formal aspects come to the fore, citizenship can function as a stratification mechanism and, therefore, as a form of social privilege.²² The privileges of citizenship are particularly evident when a national community belongs to a country in the Global North, which has strong welfare provisions.²³

The example of foreign prisoners is only one among several developments that have brought forth the relevance of citizenship status for criminal justice practice. From a sociological perspective, criminal justice is certainly no longer only a relation among citizens. In most Western European countries non-citizens constitute a large proportion of the sentenced and imprisoned populations. This varies greatly, from over 50% in countries such as Austria, Greece and Luxemburg to approximately 25-30% in Italy, Denmark, Germany, Spain and France.²⁴ Also in Norway, foreign citizens have in the past decade constituted approximately 30% of the prison population, reaching as high

17 Western (2014) p. 302.

18 Isin and Nielsen (2008).

19 Bosniak (2017) p. 315.

20 Bosniak (2017).

21 Damsa (2022).

22 Damsa and Franko (2023).

23 Barker (2018).

24 Prison Studies, World Prison Brief Data (n.d).

as 50% among remand prisoners.²⁵ Due to these developments, Norway converted in 2012 Kongsvinger prison into an all-foreign prison. Although operating within the same system of rights as other Norwegian prisons, the institution has produced feelings of discrimination and racism among inmates which, as suggested by Ugelvik and Damsa, can be seen as direct results of the change in institutional goals geared towards expulsion.²⁶

However, citizenship status is not only relevant for the execution of sentences, but increasingly also for the nature of sanctions imposed, which become guided by the purpose of social exclusion and termination of membership. In recent years, deprivation of citizenship of persons deemed to threaten the interests of the state has been revived as a key tool for security and counterterrorism.²⁷ The phenomenon of so-called foreign fighters has led in several European countries to the introduction of counter-terrorism measures which curtail citizenship rights.²⁸ In the UK, the Immigration Act 2014 includes a power to deprive naturalized British citizens of their citizenship on security grounds, even if doing so would render individuals stateless.²⁹ Denationalisation is, as Gibney points out, the ‘non-consensual withdrawal of nationality from an individual by his or her own state.’³⁰ These measures have serious human rights implications.³¹ As Gibney suggests:

*The revocation of citizenship is an extreme act of state, one analogous to the death penalty. While capital punishment involves the physical death of one of its members, denationalisation involves, in principle, the individual's civic death, the severing of the ties of responsibility between the state and its citizen.*³²

Through denationalisation the state wields the power to transform the individual into an alien in the eyes of the law. As such, the measure has a problematic history and has been due to its controversial nature used quite rarely in most of the post-WW2 period.

Questions of national security, criminal law and citizenship status are thus connected in intricate ways. In Norway, there is a quarantine for accessing citizenship rights for previous criminal convictions (Statsborgerloven §9). The country also recently introduced the possibility of removal of citizenship from dual citizens, if they have been punished for serious offences, or have shown conduct that is damaging to the

25 Franko (2020).

26 Ugelvik and Damsa (2018).

27 Zedner (2016).

28 Zedner (2019).

29 Ibid.

30 Gibney (2020).

31 Zedner (2016), Zedner (2019).

32 Gibney (2020) p. 2551.

country's national interests.³³ In Norway, originally, the loss of rights inherent in the removal of citizenship has not been included among penalties prescribed in criminal law, but became so through the amendments in 2018.^{34,35}

The growing relevance of membership issues and immigration law to criminal law has been in scholarly literature termed 'crimmigration law'.³⁶ The development has received considerable attention particularly in common law countries, yet it has been largely overlooked within Norwegian and Scandinavian criminal law scholarship. This omission is certainly unwarranted by the developments taking place at the level of practice. Scandinavian countries have in recent years employed a series of penal and crime preventive measures directed at foreign citizens, such as more severe penalties for certain types of offences (i.e. breaches of immigration law, property offences, gang membership), and increased use of expulsion or deportation. Norway, in particular, has in the past decade actively used deportation as a crime preventive measure.³⁷ In 2012, deportation became a performance indicator for police districts and empirical studies have shown that Norwegian police often use punishment in order to be able to deport certain groups of foreign (particularly EEA) citizens that are considered unwanted from the perspective of public order.³⁸ In these cases, deportation can be administered for quite minor offences. However, when it comes to so-called third country citizens (those originating outside the EU), deportation is used *instead* of punishment, since it is often considered more effective in terms of crime prevention and more painful than a prison sentence, as well as more economically prudent in terms of the use of state's resources.³⁹

A minor drug offence may produce radically different outcomes depending on the citizenship status of the offender. For a Norwegian citizen, it may due to more lenient enforcement of drug laws increasingly result in no penal sanction. For a Romanian citizen, on the other hand, it may result in a criminal sanction and an expulsion.⁴⁰ While a Nigerian citizen (depending on residence status and attachment to the country) may only receive an expulsion and be deported to his or her country of

33 Statsborgerloven, §26a and b.

34 Gröning et al (2023) p. 649.

35 By far the most commonly used form of denationalisation have been revocations of citizenship and residence rights due to breaches of immigration law (Brekke et al. (2019)).

36 Stumpf (2006), Garcia Hernandez (2018).

37 Franko (2020).

38 Gundhus (2016), Jahnsen and Skilbrei (2018), Franko (2020).

39 Franko (2020).

40 The term expulsion as used in the article refers to the measure in immigration law (ch 8) and §122 (expulsion of EU/EEA citizens) as well as §123. While the term deportation in Norwegian mainly refers to the execution of an expulsion decision, it is in this article used interchangeably with expulsion; a usage that better conforms to English terminology.

origin. Same offences may therefore produce greatly different outcomes depending on the citizenship status and membership affiliation of the offender. Citizenship and residence status are thus of central importance to how and why the state uses its power to punish. These developments break up the assumption of universality within the criminal law and introduce an additional rationality to the purpose of punishment, namely, immigration control objectives. When used over non-members penal power (including the types of sanction and the institutional mode of their execution) in central ways changes its character and can be described as a 'bordered penalty'.⁴¹ It gains an additional objective of border control which has vital implications for the understanding of justice and thinking about rights.

These developments are in themselves not unique as other scholars have pointed out the growing tendency towards the intertwining of criminal and administrative law.⁴² However, crimmigration practices have not been anchored within a normative framework. The practical implementation of the law has been marked by a large margin of discretion given to law enforcement agents and what David Alan Sklansky describes as ad hoc instrumentalism.⁴³ This is a pragmatic 'manner of thinking about law and legal institutions that downplays concerns about consistency and places little stock in formal legal categories, but instead sees legal rules and legal procedures simply as a set of interchangeable tools'.⁴⁴ Although not unique to immigration enforcement, within this approach law enforcement agents are given the advantage of being able to choose freely between the criminal and administrative options and can adjust their strategies according to their objectives and the availability of resources, while a more systematic level of principled reflection is missing.⁴⁵

Where crimmigration issues are concerned, there seems to be a barrier within the criminal law discourse, which places these matters firmly into the domain of immigration law, and thus effectively irrelevant. There is relatively little case law on the subject, as few crimmigration defendants have the resources to bring the cases to the courts, and the Supreme Court judgements on the subject are quite rare. This article argues that questions of membership deserve a proper attention within criminal law scholarship and jurisprudence since they open important matters of principle. In what follows, two such questions of principle will be addressed – the question of proportionality and equality before the law - the relevance of which will be examined through the discussion of a recent decision by the Supreme Court of Norway.

41 Aas (2014), Franko (2020).

42 See inter alia Jacobsen (2017) who points out, for example, that the placement of juvenile punishments outside the courts potentially challenges the established division of power and the proportionality principle.

43 Gundhus (2016); Van der Woude and Van der Leun (2017), Sklansky (2012).

44 Sklansky (2012).

45 Suominen and Husabø (2012), Franko (2020).

3. The Supreme Court of Norway: HR-2022-653-A

The case HR-2022-653-A addresses the validity of a decision by the Norwegian Immigration Board (UNE) about the expulsion of a foreign citizen due to a serious criminal offence. The person A was born in Chechnya and is a Russian citizen. He came to Norway in 2003 when he was 11,5 years old and had lived in the country ever since. All his schooling had taken place in Norway, as he was unable to attend school in Chechnya. Also his parents and siblings lived in Norway. A was not married and had not established his own family in the country. He received a permanent residence permit in 2007. In 2016, A received a criminal conviction and a 7-year prison sentence for several aggravated robberies, which he committed at the age of 23. Norwegian immigration authorities (UDI) decided in 2017 to permanently expel A from the country and from the Schengen area. The gist of the Supreme Court's deliberation addressed the question of proportionality of the decision to expel. However, in what follows, I will also discuss two other matters of interest: the Court's understanding of membership and of equality before the law.

When it comes to proportionality deliberations concerning the decision to expel, the *seriousness of the offence* and the individual's *attachment to the country* were two main factors that were taken into account. (This framing did therefore not weigh the seriousness of the offence against the seriousness of punishment.) The Court's decision was guided by § 70 of the Immigration act which states that:

A foreign citizen cannot be expelled if, taking into consideration the seriousness of the offence and the individual's attachment to the country, the decision would be a disproportionate burden on the foreign citizen or his closest family members.

In its previous judgements, the Court established a high threshold for declaring expulsion disproportionate in cases concerning serious crime, also when a foreign citizen started living in the country at a young age.⁴⁶ In a similar case, concerning a man who came to the country at the age of twelve and had lived there for eleven years, the Court found that expulsion was not a disproportionate burden taking into consideration two convictions with a total sentence of three years and six months.⁴⁷

In its judgement the Court points out that an important grounding for the weight attached to the seriousness of the offence is the legislator's intention for the provisions of the immigration law.⁴⁸ These have an explicit crime preventive objective:

A central aspect of immigration control is to be able to keep outside the country's borders persons who are unwanted here because of crime or some other circumstances. It would be contrary to the general sense of justice and would

46 HR-2007-798-A.

47 HR-2005-375-A - Rt. 2005 p. 238.

48 HR-2022-653-A, para 35.

*weaken the general trust in immigration policies if there were no possibilities for expelling foreigners who commit crime or who endanger vital national interests. (...) The threat of expulsion can in itself prevent disorder and crime.*⁴⁹

The provision clearly exemplifies the hybrid nature of crimmigration law. Crime control and immigration objectives are intertwined and general prevention of crime is achieved through the use of immigration law. In its judgement, the Court endorses a different understanding of general prevention of crime than what is traditionally addressed in criminal law textbooks, where general prevention is primarily addressed to the citizens of the state and achieved through the use of traditional penalties (such as prison and fines). In this case, immigration law is clearly used for a crime preventive purpose and the crime preventive signals are communicated to non-citizen subjects.

The Court acknowledges that expulsion will be a very serious burden on A, who came to Norway as a child and had spent most of his youth in the country, but concludes nevertheless that the offences he committed are so serious that expulsion cannot be considered as disproportionate.⁵⁰ The Court specified that it used the following criteria to evaluate the seriousness of the offence:

- the sentencing range
- the nature of the criminal offence
- the actual sentence
- aggravating and mediating circumstances
- if the foreign citizen has committed several criminal offences
- if the foreign citizen has committed several criminal offences after a warning of possible deportation had been issued or after a previous deportation case had been dropped.⁵¹

Although they in greater detail specify the circumstances pertaining to the offence, these criteria largely coincide with those set out by the ECtHR which has, through several judgements, created a relatively detailed set of considerations for the evaluation of proportionality (often referred to as “Boutlif criteria”; *Boutlif v Switzerland*).⁵² These are as follows:

49 Ot.prp. nr. 75 (2006-2007) pt. 15.6.1.

50 Ibid. pt. 52.

51 Ibid. pt. 37, See §37 and Prop. 40 L (2019-2020) p. 8.

52 Morano-Foadi and Andreadakis (2011).

- the nature and seriousness of the offence committed by the applicant;
- the duration of the applicant's stay in the country from which he is going to be expelled;
- the time which has elapsed since the commission of the offence and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage and other factors pertaining to family life; whether there are children in the marriage and, if so, their age, and;
- the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin.

In *Üner v. The Netherlands*, this set of criteria was subsequently expanded with:

- the best interests and well-being of the children, and
- the solidity of social, cultural and family ties with the host country and with the country of destination.

In *Üner*, like in HR-2022-653-A, ECtHR found that expulsion of an immigrant who had resided in the country since childhood was not disproportionate as the seriousness of the offence outweighed all other considerations.

4. On (dis)proportionality and the question of double punishment

'The principle of proportionality - that penalties be proportionate in their severity to the gravity of the defendant's criminal conduct' is, as Andrew von Hirsch points out, a basic requirement of fairness.⁵³ And although there is considerable disagreement as to whether expulsion is a penalty, and whether it is imposed for preventive or punitive purposes, it is possible to examine the nature of proportionality considerations inherent in HR-2022-653-A. The judgement is by no means unusual. As we saw, its reasoning on proportionality is in line with previous judgements of the Supreme Court of Norway and ECtHR jurisprudence.

There can be no doubt that where foreign offenders are concerned the gravity of their offence is weighed twice. First, in terms of its proportionality to the penalty imposed during (criminal law) sentencing. Second, in terms of proportionality of the gravity of the offence to the burden imposed by the expulsion (on the offender and his family). The second deliberation on proportionality may take place several years after the

53 von Hirsch (1992).

first one, after the sentence had been served and when citizen offenders, normally, would be free to resume their lives. In the case of A discussed above, the weight of his criminal offence was first found to be proportionate to a 7-year prison sentence. One year later, the seriousness of his offence was also found to outweigh the strength of his attachment to the country and resulted in expulsion for life by the immigration authorities.

The position of citizens and non-citizen offenders is, therefore, one of *systematic differential treatment*. A criminal offence carries a double negative payoff for a non-citizen offender, regardless of whether the second payoff is semantically defined as a penalty or a purely administrative sanction.⁵⁴ And while criminal law has a finely tuned normative framework for evaluating the first set of proportionality considerations (conducted by the courts),⁵⁵ the second set is much cruder and less rooted in a principled and normative framework. Moreover, in Norway, the second set of proportionality decisions is conducted by administrative bodies, where offenders have to, as a general rule, cover their costs of legal assistance, and only a small proportion of these decisions ever reaches the courts. As Juliet Stumpf points out, proportionality is conspicuously absent from the legal framework for immigration sanctions, which tend to rely on one sanction only – deportation.⁵⁶ Stumpf calls for a need to ‘align immigration law with the broader landscape of legal sanctions.’⁵⁷

These processes of aligning have so far not taken place. There seems to be a barrier that prevents the two forms of proportionality considerations to be put in relation to each other. Although both stem from the same offence, one is primarily guided by criminal law principles and the other by immigration control objectives. The Norwegian Supreme Court expressed this explicitly in HR-2009-929-A, where the offender had been convicted of serious breaches of the Immigration Act:

*The seriousness of the offence must be seen in view of administrative law, not criminal law. /.../ Conclusions cannot be drawn from the sentencing range of the offence in question. The seriousness of the offence has to be considered with regard to the purpose of the immigration law, i.e. § 2. A's offence is damaging to the control objectives that immigration law wishes to achieve.*⁵⁸

The usual argument why the two sets of proportionality considerations are to be considered separate is that, although stemming from the same offence, the sanction imposed in phase two is not a punishment. The two are, therefore, seen as incomparable. A standard reference point for this line of thinking is ECtHR's

54 Franko and Mohn (2015).

55 Gröning et al. (2023).

56 Stumpf (2009).

57 Ibid. p. 1683.

58 Hr. 2009-929-A (Norway).

decision in *Maaouia v France*. In that case, the majority held that an administrative decision to expel an immigrant does not have to comply with the requirements of Article 6 of the ECHR and its fair hearing guarantees.⁵⁹ *Maaouia* has been one of the most cited cases in the ECtHR's migration case law and has cast a long shadow over the established conceptual understanding of deportation as a purely administrative sanction.⁶⁰ However, the view is by no means uncontroversial and critics have come also from the ECtHR's own bench. In *Üner*, three judges issued a joint dissenting opinion arguing not only that the judgement gave undue priority to one criterion (the gravity of the offence) at the expense of the others, but also that the expulsion amounted to a 'discriminatory punishment imposed on a foreign national in addition to what would have been imposed on a national for the same offence'.⁶¹ The judges argues that:

*Whether the decision is taken by means of an administrative measure, as in this case, or by a criminal court, it is our view that a measure of this kind, which can shatter a life or lives – even where, as in this case, it is valid, at least in theory, for only ten years (quite a long time, incidentally) – constitutes as severe a penalty as a term of imprisonment, if not more severe.*⁶²

Interestingly, another separate opinion (by judge Maruste), which concurs with the majority decision to expel, refers to 'expulsion as part of a criminal sanction'. In his opinion, Maruste highlights that 'an ability to determine what constitutes a crime and what should be the consequences (penalty) is part and parcel of the very sovereignty of the State'⁶³. He firmly places deportation within the sphere of state sovereignty pertaining to criminal law. The dissensions in *Üner* make visible the fraught nature of deportation. While the majority decision is careful to define deportation as a preventive measure rather than punitive, the dissenting opinions refer to it as a penalty.

The argument that deportation is punishment is often grounded in the acknowledgement that it can be experienced as just as painful if not more painful than imprisonment. This is also confirmed by empirical studies, although the experience of painfulness naturally depends on the offender's attachment to the country, particularly family ties.⁶⁴ This equation of punishment with pain has a long ideological history. In Norway, Johs Andenæs' definition (drawing on Hagerup, 1930) has been among the most influential: 'Punishment is a pain which the state inflicts

59 Article 6 ECHR- gives a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

60 Byrne et al. (2023).

61 Para 17.

62 Ibid.

63 *Üner v. The Netherlands*, CONCURRING OPINION OF JUDGE MARUSTE.

64 Strømnes (2013), Damsa (2022).

on an offender because of the offence, with the intention that he will feel it as a pain'.⁶⁵ Nils Christie, a contemporary of Andenæs, also argues that 'imposing punishment within the institution of law means the inflicting of pain, intended as pain'.⁶⁶ Similarly, von Hirsch defines punishment as (a) a censure of an offender for an offence and (b) the intentional imposition of hard treatment.⁶⁷ These conceptions of punishment as painful and 'hard treatment' obviously focus on imprisonment and tend to overlook less intrusive, and for some relatively painless, sanctions such as fines, which constitute the majority of penal sanctions today. Other measures imposed by the state may be equally or more painful than imprisonment, yet are not defined as punishment.⁶⁸

However, it is important to point out that the proximity of deportation to punishment lies not only in its perceived painfulness. Two other components of Andenæs' definition are also in place: a) deportation comes as *a consequence* of a criminal offence, and b) it is administered with *an intent* of being painful. As we saw in the Supreme Court's reasoning presented above, decisions to expel clearly have crime preventive intentions akin to traditional general prevention. Therefore, even though an offender may, for example, lose the ability to practice his or her profession or the custody of a child as a consequence of a criminal conviction, these administrative decisions are (unlike loss of citizenship rights mentioned above) not rooted within the State's general framework of crime prevention.

While the issue of deportation as double punishment remains relatively unchallenged in legal terms, attempts have been made to acknowledge its punitive nature and the seriousness of its consequences. Several jurisdictions have taken steps to create a closer alignment of the first and second stage of proportionality considerations by strengthening the procedural safeguards in the second stage of considerations, for example by making deportation decisions a matter for the courts rather than administrative bodies, as well as falling under the criminal law provisions of legal aid. In a groundbreaking decision in *Padilla vs Kentucky*, the U.S. Supreme Court found that the constitutional right to counsel must include advice on the immigration consequences of a criminal case.⁶⁹ The court stated that 'as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes' and therefore demanded competent legal counseling. Some jurisdictions have taken steps towards making the stage one and stage two proportionality considerations part of the same (sentencing) procedure. In the UK, for example, York points out that the 'consideration of whether to make a

65 Andenæs (2004) p. 10. Andenæs uses the term 'onde' in Norwegian, which can be translated as a pain or as evil.

66 Christie (1981) p. 5.

67 von Hirsch (1990).

68 Stub (2011).

69 *Padilla vs Kentucky* 559 U.S. 356 (2010).

recommendation for deportation is part of the criminal sentencing procedure, and a decision on that is part of the judicial finding of the court.⁷⁰ Although the UK Sentencing Guidelines clearly state that a ‘recommendation for deportation is not part of the punishment such as to justify a reduction in the sentence’, they nevertheless challenge the strict division between stage one and stage two proportionality deliberations by making deportation a part of the sentencing procedure.⁷¹ The guidelines also state that ‘[p]rosecutors should be ready to assist the court by making submissions as to the appropriateness of a recommendation for deportation.’⁷² Although it is not unusual for Norwegian courts to reduce a sentence due to other burdens imposed on the offender, this is not the case when it comes to deportation.⁷³ In Norway, the spheres of criminal and immigration law remain conceptually, procedurally, and institutionally firmly separated.

5. Discussion: punishment as termination of membership

The examples above reveal the centrality of membership status for the outcomes of criminal offences. Termination of membership and expulsion from the community are measures that are systematically imposed by the state as a consequence of a criminal offence. For non-citizen offenders, their membership in the community is only probationary and can be cancelled through the interplay of criminal law and immigration law. For this group, punishment is intrinsically connected with issues of membership and can result in the termination of membership.⁷⁴

A question can be asked though: what kind of understanding of community, society and membership underpins this kind of thinking about criminal law and criminal justice? The Norwegian Supreme Court decision and the ECtHR jurisprudence make it clear that long-term immigrants, including those who had spent much of their childhood in the country, are not protected from expulsion as a consequence of committing a criminal offence. Although childhood in the country is an important factor in proportionality deliberations, it is not an absolute obstacle.⁷⁵ In the case of A, the court found that a return to Russia and a life-long banishment from Norway (a country where he had lived since the age of 11, had conducted his schooling in and in which live all his closest family members), were not disproportionate measures compared to the gravity of the offence.

70 York (2017) p. 23.

71 The Crown Prosecution Service (2023).

72 York (2017) p. 23.

73 In a recent highly publicised case, the court reduced the sentence for several defendants convicted of rape due to severe exposure in social media. Available from: (URL).

74 Franko (2020).

75 See also, Rt. 2005 p. 238 (Norway).

This understanding of membership puts priority on formal membership rather than what might be termed ‘lived citizenship’ or de facto membership. In this formal approach to citizenship, citizenship status is seen as a binary issue, rather than one of scale. Alienage (i.e. lack of citizenship) then appears as an appropriate and self-evident basis for differential treatment. However, there has been a growing body of scholarship pointing out the importance of lived citizenship, which recognises ‘the embodied, relational and lived experiences of being a citizen in everyday life.’⁷⁶ Drawing inspiration from critical and feminist studies, this approach puts priority on actual ways in which people live in a given community, rather than on state authorized ways of being. These ‘partial’ experiences of being a citizen have in legal and political theory often been defined through the notion of denizenship.⁷⁷ The figure of the denizen has, as Walker points out, become increasingly important particularly in the context of the EU law and policy, which has ‘encouraged the development of a new hybrid status of the permanent resident who possesses many legal and social rights but lacks full political citizenship.’⁷⁸

In HR-2022-653-A, the court is not attuned to such nuances and gives primacy to formal citizenship and the sovereignty principle. Although A’s situation could be described as one of denizenship and a high degree of lived citizenship (i.e. living in the country since the age of 11, schooling and family ties), the fact that he is, formally, an alien, carries greater weight and justifies a permanent, life-long banishment. Keeping in mind that Norwegian criminal law does not have death penalty nor (at least in principle) life-term imprisonment among its sentences, there are few other measures that come close to such complete exclusion from society.⁷⁹ These measures reveal that, in some ways, we are still struggling with the normative challenge presented by the state-centric international order that Hanna Arendt was critical of several decades ago: a right to belong to some kind of organised community.⁸⁰ Moreover, deportation also carries an implication that A (and others like him) is considered by the state to be non-reformable. York thus asks: ‘Can foreign offenders ever be rehabilitated?’⁸¹ Her questions chimes with Zedner’s: ‘Is criminal law only for citizens?’

76 Kalio et al. (2020).

77 Hammar (1990).

78 Walker (2008) p. 5.

79 However, Norway increasingly uses indefinite preventive detention (i.e. *forvaring*), which has important similarities to life-imprisonment (Dahl et al., 2023).

80 Arendt (1951/1968).

81 York (2017) p. 31.

The primacy given to the nation state and the sovereignty principle in judicial decision making at the national and European level has had its fair share of critics.⁸² In her extensive analysis of ECtHR jurisprudence, Marie Benedicte Dembour pessimistically concludes that:

*For most people it does not appear objectionable that the European Court approaches the migrant, first as an alien (if she is one) who is subject to the control of the state, even though this means that human- rights strangely take second place to the sovereignty principle.*⁸³

This understanding of justice takes as self-evident that alienage (i.e. lack of citizenship) entails largely differential treatment in terms of consequences of a criminal offence, justifications of punishment, two separate tracks and different sets of criteria for evaluating proportionality of state sanctions. It builds on the nation-state as an 'imagined community' and an ideal, in which the alien presents an aberration and an afterthought.⁸⁴ As Brubaker points out: 'As an analytical ideal type, the nation-state is a model of political, social, and cultural organization; as a normative ideal type, it is a model for political, social, and cultural organization.'⁸⁵ In this ideal understanding, 'state territory and citizenry should be congruent.'⁸⁶

Having the nation state and citizenship as an ideal has profound normative implications for criminal law. According to Linda Bosniak it creates a 'prevailing set of baseline premises according to which the territorial nation state is the rightful, if not the total, world of our normative concern' – what she defines as normative nationalism.⁸⁷ This approach defines the current common-sense assumptions that: a) formal citizenship (and lack thereof) is a natural and appropriate ground for differential treatment and allocation of rights; and b) that criminal law and immigration law present two separate spheres, where membership rights are not recognised as part of criminal law's central concerns. Within such an understanding, the differential treatment of citizens and non-citizens is not seen as discriminatory, nor does challenge the prevailing notions of equality.

82 A recent Norwegian report by an expert committee critiqued the strict practice for evaluating the proportionality of deportation in cases concerning the rights of the child (Justis- og beredskapsdepartementet, 2022).

83 Dembour (2015) p. 504.

84 Anderson (2006).

85 Brubaker (2010) p. 62.

86 Ibid. p. 63.

87 Bosniak (2006) p. 135.

6. Conclusion: Is equality before criminal law a fractured ideal?

The issue of equality before the law is one of the most entrenched ideals of liberal thought at the same time as it has been throughout history fraught with paradox. As James Q. Whitman observes:

*Every western democracy embraces some version of the ideal of equality before the law. In particular, every western society embraces some version of the ideal of equality before the criminal law. Who would disagree with the proposition that criminal justice should show no favoritism on account of wealth, social status, race, or any other individual characteristic?*⁸⁸

However, as pointed out earlier by reference to Beccaria's problematic relationship with slavery, the issue of equality in criminal law is intricate and full of contradictions. An extensive body of scholarship has pointed out how the rise of the treatment ideology by the late 19th and in the 20th century created a new set of ideological conditions which led to the unequal treatment of criminal offenders and disparate sentencing outcomes, as well as a new conception of criminal law more generally. As Michel Foucault's critique of the prison famously argued, the penal disciplinary apparatus (aided by the growing influence of psychiatry and psychology) systematically undermined the ideals of equal treatment.⁸⁹ It was the offender (or the 'criminal man') that was in focus, while the offence became a secondary consideration.⁹⁰

A large body of more recent legal and socio-legal scholarship has connected unequal treatment within criminal law to real life inequalities of wealth, social standing, gender and age.⁹¹ Concerns about the role of the law in relation to inequality have been also forcefully voiced with the so-called intersectionality scholarship. In her pioneering work, Crenshaw coined and conceptualised the term to demonstrate the juridical erasure of the subjectivities of women of color within the justice system.⁹² Drawing on this, other legal scholars explored the ways in which various complex identities interacted with legal structures, particularly with regards to racialisation and gendering.⁹³

It is beyond the scope of this article to provide a comprehensive overview of this diverse scholarship. It may suffice to say that there is currently a large and growing body of academic work and political activism focusing on how social inequality shapes

88 Whitman (2009) p. 119.

89 Foucault (1977).

90 Christie (1981).

91 Mathiesen (2011), Ikdahl et al. (2022).

92 Crenshaw (1989/1991).

93 See, inter alia Cho (2013) for an overview.

policing practices, definitions of crime and institutional responses to it.⁹⁴ However, intersectionality scholarship has been relatively silent on issues of formal membership and has thus yet to systematically recognise the importance of citizenship status for the mutual shaping of inequalities.⁹⁵

The findings of this article show that the notion of equality before the criminal law is in danger of becoming a deeply fractured ideal, not only because of the real-life inequalities of class, race and gender that shape the everyday practices of criminal courts in most countries. Cracks are built into the very structure of criminal law because of its silence on, or more precisely its separation from, issues of membership. This silence on citizenship is even more incongruous in times of growing trans-border mobility and social diversity and brings into question the law's ability to adapt to social change. The nation state as a normative ideal is today under pressure from several holds and a question can be asked to what extent it is sustainable today as a model of justice.⁹⁶ Bosniak thus argues that a theory of justice (as found for example in Rawls) based on a conception of a democratic society as a complete and closed social system is today empirically unattainable and normatively unsatisfying.⁹⁷ Also criminal justice institutions are increasingly under pressure to acknowledge and incorporate the growing diversity of the population into its normative frameworks and practice. In Norway, this acknowledgement was, ironically, symbolically expressed by the sovereign in the famous speech given by King Harald in 2016.⁹⁸ Although the speech received most attention for acknowledging the diversity of sexual and gender identities of Norwegians, it had also a poignant passage about the varieties of belonging and diversity of paths to 'becoming a Norwegian'.

Norwegians come from the north of the country, from the middle, from the south and all the other regions. Norwegians are also immigrants from Afghanistan, Pakistan, Poland, Sweden, Somalia and Syria. My grandparents immigrated from Denmark and England 110 years ago. It is not always easy to see where we come from, which nationality we belong to. What we call our home is where our heart is – and that cannot always be placed within the boundaries of a state.⁹⁹

There is no doubt that citizenship holds an enduring appeal and legitimacy for notions of belonging and for the grounding of justice. Citizenship (and nationality) in the modern state is, as Gibney observes, in many ways uniquely secure as a status

94 Paik (2017), De Coster and Heimer (2017).

95 Damsa and Franko (2023).

96 Fraser (2008).

97 Bosniak (2006) p. 6.

98 Det Norske Kongehuset (2016).

99 Det Norske Kongehuset (2016).

and thus as a ground for rights.¹⁰⁰ The dilemma posed by non-citizens to criminal law and criminal justice may, therefore, not be open to easy solutions. One direction ahead suggested by several scholars is to challenge the citizen/non-citizen binary and articulate a framework for giving certain citizenship rights to non-citizens.¹⁰¹ As Linda Bosniak points out ‘many of citizenship’s core attributes do not depend on formal citizenship status at all but extend to individuals based on the facts of their personhood and national territorial presence.’¹⁰² Zedner thus argues that ‘citizenship should not be a predicate for basic rights and that in a liberal democracy the protections of the criminal law, criminal process and just punishment apply to all irrespective of citizenship.’¹⁰³ What is also important is that these discussions should take place before one implements measures and policies based on differential treatment, such as for example, separate imprisonment regimes. If the law is to take its commitment to the principle of equality seriously, it should examine the taken-for-granted assumptions about legitimacy and naturalness of differential treatment between citizens and non-citizens.

From a justice perspective, citizenship can be seen as an inherited privilege. As Shachar and Hirschl point out, there are ‘conceptual and legal similarities between intergenerational transfers of citizenship and property’ (evident, for example, in practices of citizenship for sale).¹⁰⁴ And while it is not a primary task for the law to alleviate the inequalities of wealth that stem from birth, we should be mindful of circumstances under which ‘the accident of being born in the global South’ becomes a legal handicap for the citizens of these countries, particularly disadvantaged ones.¹⁰⁵ Returning to Beccaria and his fight against the privileges of birth, we can ask what a principled egalitarian position would look like today and to what extent should citizenship status determine criminal justice outcomes?

100 Gibney (2017).

101 Zedner (2013).

102 Bosniak (2006) p. 3.

103 Zedner (2013) p. 53.

104 Shachar and Hirschl (2007) p. 253.

105 Dauvergne (2008) p. 17.

References

Case law

Høyesterett, 03.11.2005 – HR-2005-375-A – Rt. 2005 p. 238 (Norway).

Høyesterett, 03.05.2007 - HR-2007-00798-A (Norway).

Høyesterett, 30.04.2009 – HR-2009-929-A (Norway).

Høyesterett, 28.03.2022 - HR-2022-635-A (Norway).

Padilla v. Kentucky 559 U.S. 356, 31.03.2010.

Public documents

Det Norske Kongehuset (2016) *Hagefest i Slottsparken: Velkomsttale*. Det Norske Kongehuset. Available from: (URL).¹⁰⁶

Husabø E J and Suominen A E (2012) *Forholdet mellom straffeprosesslovens og utlendingslovens regler om fengsling og andre tvangsmidler: En utredning avgitt til Justisdepartementet*. Available from: (URL).

Justis og beredskapsdepartementet (2022) *Terskelen for utvisning i saker som berører barn, En utredning av forholdsmessighetsvurderingen med særlig henblikk på barnets beste i saker der en av foreldrene blir utvist som følge av brudd på utlendingsloven*. Regjeringen. Available from: (URL).

Ot.prp. 75 (2006-2007) Om lov om utlendingers adgang til riket og deres opphold her.

Prison studies (n.d) *World Prison Brief data*. Available from: (URL).

The Crown Prosecution Service (2023) *Sentencing - Ancillary Orders*. Available from: (URL).

Walker N (2008) Denizenship and the Deterritorialization in the EU. *EUI Working Papers LAW* No. 2008/08, Available from: (URL).

¹⁰⁶ All webpages referred to are last accessed on November 8, 2023. Long URL links have been shortened to '(URL)'

Legislations

European Convention on Human Rights, 31.08.2022. Available from: (URL).

Act 2005-06-10-51 on Norwegian citizenship (Lov om norsk statsborgerskap (statsborgerskapsloven)).

Literature

Aas K F (2014) Bordered penalty: Precarious membership and abnormal justice. *Punishment & Society* 16 (5), 520-541.

Andenæs J (2004) *Alminnelig strafferett*. 5th edn. Oslo: Universitetsforlaget.

Anderson B (2006) *Imagined communities: Reflections on the origin and spread of nationalism*. London: Verso.

Anderson Y A and Gröning L (2016) Rehabilitation in principle and practice: perspectives of inmates and officers. *Bergen Journal of Criminal Law & Criminal Justice* 4 (2), 220-246.

Barker V (2018) *Nordic Nationalism and Penal Order: Walling the Welfare State*. London: Routledge.

Beccaria C (1764/2008) *On Crimes and Punishment and Other Writings*, edited by Thomas A, translated by Thomas A and Parzen J. Toronto: University of Toronto Press.

Bosniak L (2006) *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton, NJ: Princeton University Press.

Bosniak L (2017) Status non-citizens, in eds. Shachar A, Baubock R and Bloemraad *The Oxford Handbook of Citizenship*. Oxford: Oxford University Press, 314–336.

Brekke J P, Birkvad S R and Erdal M B (2019) *Losing the Right to Stay: Revocation of immigrant residence permits and citizenship in Norway – Experiences and Effects*. Oslo: Institute for Social Research/Institutt for Samfunnsforskning.

Brubaker R (2010) Migration, membership, and the modern nation-state: Internal and external dimensions of the politics of belonging. *Journal of Interdisciplinary History* 41 (1), 61-78.

Burgio A (2008) Introduction: Between Law and Politics – The Idea of Equality in *On Crimes and Punishments*, in eds. Beccaria C (1764/2008) *On Crimes and Punishment and Other Writings*, ed. Thomas A, translated by Thomas A and Parzen J. Toronto: University of Toronto Press.

- Byrne W H, Gammeltoft-Hansen T and Olsen H P** (2023) Network analysis and comparative migration law: examples from the European Court of Human Rights. *International Journal of Migration and Border Studies* 7 (2), 197-213.
- Cho S** (2013) Post-intersectionality: The curious reception of intersectionality in legal scholarship. *Du Bois Review* 10 (2), 385–404.
- Christie N** (1981) *Limits to Pain*. Eugene, Oregon: Wipf and Stock Publishers.
- Dahl H, C A Appleton, B Johnsen, J Todd Kvam and R C Whittington** (2023) Assessing the evolution of the forvaring system and the role of risk assessment. Paper presented at Kriminologikonferansen 2023, Oslo.
- Damsa D** (2022) *Women and bordered penalty in the Nordic welfare state*. PhD thesis. Oslo: University of Oslo.
- Damsa D and Franko K** (2023). ‘Without Papers I Can’t Do Anything’: The Neglected Role of Citizenship Status and ‘Illegality’ in Intersectional Analysis. *Sociology* 57 (1), 194–210. Available from: <https://doi.org/10.1177/00380385221096043>.
- Dauvergne C** (2008) *Making People Illegal*. Cambridge: Cambridge University Press.
- De Coster S and Heimer K** (2017) Choice within constraint: An explanation of crime at the intersections. *Theoretical Criminology* 21 (1), 11–22.
- Dembour M B** (2015) *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press.
- Duff R A** (2010) A criminal law for citizens. *Theoretical Criminology* 14 (3), 293-309.
- Foucault M** (1977) *Discipline and Punish: The Birth of the Prison*. Translated by Sheridan A. New York: Vintage Books.
- Franko K** (2020) *The Crimmigrant Other: Migration and Penal Power*. London: Routledge.
- Franko K and Mohn S B** (2015) Utvisning som straff?: Om grensesnittet mellom strafferett og utlendingskontroll. *Tidsskrift for strafferett* 15 (2), 154-176.
- Fraser N** (2008) *Scales of Justice*. Cambridge: Polity Press.
- García Hernández C C** (2018) Deconstructing crimmigration. *UC Davis Law Review* 52 (1), 197-253.
- Gibney M J** (2020) Denationalisation and discrimination. *Journal of Ethnic and Migration Studies* 46 (12), 2551-2568.

Gröning L, Husabo E J and Jacobsen J (2023) *Frihet, forbrytelse og straff: En systematisk fremstilling av norsk strafferett*. Bergen: Fagbokforlaget.

Gundhus H O I (2016) Å målstyre skjønnsutøvelse: Profesjonalisering av politiets utlendingskontroll. *Sosiologi i dag* 46(1), 54–79.

Hammar T (1990) *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*. Aldershot: Avesbury.

Harcourt B E (2013) Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law, in ed. Dubber M *Foundational Texts in Modern Criminal Law*. University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 648, Available from: (URL).

Hirsch A V (1993) *Censure and sanctions*. Oxford: Clarendon Press.

Ikdahl I et al. (2022) *Kjønn og rett: Kvinne-, kjønns- og likestillingsperspektiver i jusstudiet*. Oslo: Cappelen Damm Akademisk.

Isin E F and Nielsen G M (2008) *Acts of Citizenship*. London: Zed Books.

Jacobsen J (2017) Utsyn over utviklingstrekk i det strafferettslege reaksjonssystemet. *Kritisk juss* 43 (3), 118-144.

Kallio K P, Wood B E and Häkli J (2020) Lived citizenship: Conceptualising an emerging field. *Citizenship Studies* 24 (6), 713-729.

Mathiesen T (2011) *Retten i samfunnet: En innføring i retts sosiologi*. Oslo: Pax Forlag.

Morano-Foadi S and Andreadakis S (2011) The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence. *European Journal of International Law* 22 (4), 1071–1088.

Paik L (2017) Critical perspectives on intersectionality and criminology: Introduction. *Theoretical Criminology* 21 (1), 4–10.

Rawls J (1971/1999) *A Theory of Justice: Revised edition*. Cambridge, Mass.: The Belknap Press.

Shachar A and Hirschl R (2007) Citizenship as inherited property. *Political theory* 35(3), Los Angeles: Sage Publications, 253-287.

Sklansky D A (2012) Crime, Immigration, and Ad Hoc Instrumentalism. *New Criminal Law Review* 15 (2), 157–223.

Smith P S and Ugelvik T (2017) *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare State?* London: Palgrave Macmillan.

- Strømnes K R** (2013) “Jeg tror at demokratiet bare er for norske folk”: utvisning og opplevelser av eksklusjon [“I think democracy is just for Norwegians”: Deportation and experiences of social exclusion]. Master’s thesis. Oslo: University of Oslo.
- Stub M** (2011) *Tilsynsforvaltningens kontrollvirksomhet*. Oslo: Universitetsforlaget.
- Stumpf J** (2009) *Fitting punishment*. Lexington: Washington and Lee University, School of Law 66 (4), 1683.
- Stumpf J P** (2006) The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power. *American University Law Review* 56 (2), 367–420.
- Ugelvik T and Damsa D** (2018) The Pains of Crimmigration Imprisonment: Perspectives from a Norwegian All-Foreign Prison. *British Journal of Criminology* 58 (5), 1025–1043.
- Van der Woude M and Van der Leun J** (2017) Crimmigration Checks in the Internal Border Areas of the EU: Finding the Discretion That Matters. *European Journal of Criminology* 14 (1), 27–45.
- von Hirsch A** (1990) Proportionality in the philosophy of punishment: From” Why Punish?” to” How Much?”. *Criminal Law Forum* 1(2), 259.
- von Hirsch A** (1992) Proportionality in the Philosophy of Punishment. *Crime and Justice* 16, 55-98.
- Whitman J Q** (2009) Equality in Criminal Law: The Two Divergent Western Roads. *Journal of Legal Analysis* 1, 119–165. Available from: <https://doi.org/10.4159/jla.v1i1.8>.
- York S** (2017) Deportation of Foreign Offenders—A critical look at the consequences of Maaouia and whether recourse to common-law principles might offer a solution. *Journal of Immigration, Asylum and Nationality Law* 31 (1), 8–33.
- Zedner L** (2013) Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment, in eds. Aas K F and Bosworth M *The Borders of Punishment Migration, Citizenship, and Social Exclusion*. Oxford: Oxford University Press.
- Zedner L** (2016) Citizenship Reprivation, Security and Human Rights. *European Journal of Migration and Law* 18 (2), 222–242.
- Zedner L** (2019) Curtailing Citizenship Rights as Counterterrorism, in eds. Goold B and Lazarus L *Security and Human Rights*. Oxford: Hart Publishing, 99–124.