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The Federal Entrenchment of Citizens in the European Union Member States' Criminal Laws: Or How EU Citizenship Is Shaping Criminal Law

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I Introduction

The Member States of the European Union (EU) do not enjoy unlimited sovereignty in deciding how to protect *their nationals*' fundamental rights and freedoms against crime through criminal law and procedure. Over the years, Member States have been increasingly sharing their responsibility in these areas with each other but also with supranational bodies, in order to ensure that the opening of their borders and the free movement of persons within the EU does not undermine *EU citizens*' fundamental rights and freedoms.

Two developments support this claim. First, by creating new responsibilities for the Member States, the concept of EU citizenship develops as a political institution, which holds the Member States to account for ensuring security and justice for EU citizens who are subjects of EU law. Member States are not only responsible for ensuring their nationals' security, but also of EU citizens who are not their nationals. Second, the creation of an Area of Freedom, Security and Justice (AFSJ), where the cooperation of police and judicial authorities involved in criminal matters is facilitated and rules concerning certain serious cross-border crimes and procedures are approximated, has considerably modified the distribution of powers between the Member States and the EU. As captured in the Preamble of the Charter of Fundamental Rights of

* This contribution builds on earlier work: see Marguery, 'La citoyenneté européenne joue-t-elle un rôle dans l'espace pénal de liberté, de sécurité et de justice?' (2010) 46 *CDE* 387. See also, van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law, 2015). The authors would like to express their gratitude to L. Senden, T. van den Brink, B. McGonigle and to the anonymous reviewers for their useful comments on the earlier drafts of this chapter.

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the EU (CFR) the Union 'places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'. These developments assume consequences for the EU federal nature since individuals are not only protected on account of national law but also of the EU.

Assuming that the EU is a polity of federal nature,[1] the central question this chapter aims to answer is whether these two developments, the introduction of EU citizenship and the creation of one AFSJ, affect one another in the field of criminal law, and inform the discussion on EU federalism marked by the shift of EU integration from the economic internal market logic towards a citizenship logic.[2] In other words, to what extent do EU citizenship and the AFSJ shape criminal law and procedure in the Member States and protect those in possession of EU citizen status?

First, EU citizens, whose movement in the Union must be guaranteed, play a political role in the recasting of the division of competences in criminal matters towards centralisation, as an incentive for the adoption of legislation to ensure security and justice in the AFSJ. The movement of persons cannot be fully enjoyed if it cannot be exercised in a safe and secure environment. Consequently, free movement justifies the adoption of EU measures in the field of criminal law which must be implemented in national systems and which further dismantle the differences between nationals and non-nationals. Section 2 argues that the AFSJ affects the vertical division of powers between the EU and its Member States in criminal law and that a *federal* European citizenship accounts for this.

Although the concerns of EU citizens are definitively addressed by the AFSJ, the latter actually does not grant rights to the former specifically *because* of their status. Section 3 analyses the legislation adopted in the AFSJ, in particular measures implementing the principle of mutual recognition and measures approximating national criminal law. It reveals that these measures definitely limit Member State competence in criminal matters, though they actually affect all individuals: whether EU citizens or not, whether moving or not. Therefore, if the Area circumscribes the Member States' discretion to regulate criminal law, this is not because *new* EU citizenship rights have been created. In this

[1] For analysis, see other contributions to this book, such as that of Nic Shuibhne; but also for example, von Bogdandy, 'The European Union as a Supranational Federation' (2000) 6 *CJEL* 27.

[2] Kochenov and Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2012) 37 *ELRev* 369.

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sense, it cannot be argued that the Area contributes to the definition of a supranational citizenship limited to Member State nationals.

This first course of action, EU citizenship justifying the establishment of an AFSJ, seems appropriate to ensure the protection of citizens in criminal matters, provided that an adequate equilibrium between measures ensuring security and measures guaranteeing justice is achieved and respected. Moreover, by relying on EU citizens' need for security and justice, the EU extends the scope of application of this growing body of *EU criminal law* to all individuals beyond the economic internal market and its cross-border logic. This definitely encroaches on the heart of Member State sovereignty, which is to say, *national* criminal law.

In addition, a second course of action is identified which seems less suitable for ensuring the protection of individuals in criminal matters and remains linked to movement: national criminal law cannot undermine the free movement of citizens in the Union. Therefore, discriminatory and non-discriminatory restrictions to free movement resulting from national criminal law are prohibited unless they are objectively justified. Focusing on the case law of the European Court of Justice (ECJ), the fourth section analyses how the right not to be discriminated against on grounds of nationality and the right to free movement impact on the vertical division of powers in criminal law between the Union and its Member States.

The analysis of cases such as *Cowan*[3] and *Wolzenburg*[4] and ***Petruhhin***[5] demonstrates that EU citizens can rely on these rights against the Member States' criminal legislation and seek protection through EU law. In particular, national criminal legislation, whether stemming from the implementation of EU criminal law or not, must not discriminate between EU citizens, nor deter them from exercising their right to move within the Union. Nevertheless, the extent of this protection in criminal proceedings is dependent on national law. In other words, EU citizens may only enjoy the protective rights granted by national legislation. The section also reveals that, beyond discrimination, the link between non-discriminatory restrictions to EU citizens movement and criminal law, as cases such as *Kremzow*[6] show, remains dependent on the existence of actual movement in the Union. Because such violations of fundamental rights in Member State criminal proceedings are not yet clearly considered as a source of restriction to EU

[3] 186/87, *Cowan*, EU:C:1989:47. [4] C-123/08, *Wolzenburg*, EU:C:2009:616.
[5] C-182/15, *Petruhhin*, EU:C:2016:630. [6] C-299/95, *Kremzow*, EU:C:1997:254.

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citizens' movement, it is questionable whether a violation of a fundamental right related to criminal law should be considered as a restriction to movement and, if so, what kind of violation should qualify.

II The Need to Protect a Federal Citizenship beyond the Cross-Border Logic as a Rationale for the AFSJ

Article 3(2) of the Treaty on European Union (TEU) provides that the Union has the objective to offer *its own* citizens an area of freedom, security and justice while ensuring the free movement of persons by adopting 'appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. This objective seems to place EU citizens at the centre of the AFSJ and reflects the constitutional maturation of EU citizenship as a concept extending beyond the internal market.[7] The establishment of the EU as an AFSJ has led to a recalibration in the division of competences in the field of criminal law between the EU and its Member States and expresses a strong political will to transfer significant aspects of the regulation of the Member States' criminal laws to the EU level. We submit that the need to protect EU citizens in a federal perspective against violations of some common values, including fundamental freedoms and rights, beyond the internal market and its cross-borders logic, explains this transformation towards greater centralisation.

The first signs of a transformation towards centralisation already began at the establishment of the AFSJ with the Treaty of Amsterdam[8] when police and judicial cooperation in criminal matters became organised within the institutional framework of the EU.[9] The suppression of the Union pillar structure by the Treaty of Lisbon has considerably accelerated this transformation.

[7] Coutts, 'Citizenship of the European Union', in Acosta Arcarazo and Murphy (eds.), *EU Security and Justice Law After Lisbon and Stockholm* (Hart, 2014).

[8] Cooperation in criminal matters between Member States started long before the Treaty of Amsterdam, in particular in the context of Council of Europe conventions; see, Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 2011), 656–58; Klip, *European Criminal Law* (Intersentia, 2012), 336–56.

[9] This led to important developments best illustrated with, for example, the application of the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters; see European Council, 'Presidency Conclusions, Tampere European Council of 15 and 16 October 1999', para. 33.

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Now the supranational institutional framework for EU law applies in the fields of policing and criminal law with a few exceptions.[10] The Member States share with the Union the competence to regulate certain aspects of their criminal law and procedure in Title V of the Treaty on the Functioning of the EU (TFEU) concerning the AFSJ.[11] It seems, therefore, appropriate to refer to the rules adopted under this EU competence, which we will further analyse in the next sections, as *EU criminal law*.

The EU citizen plays an indirect role legitimating the adoption of EU criminal law, and consequently in the repartition of powers in the Area. In this regard, free movement of EU citizens is a policy justification which links EU citizenship, the AFSJ and national criminal law. First, free movement of EU citizens justifies the adoption of EU criminal law which impacts on national criminal law *ex ante* in cross-border situations; second, it justifies *ex post* that this EU legislation actually extends beyond cross-border situations and applies to internal criminal proceedings.

Ex ante, European Council Conclusions and multi-annual programmes concerning the AFSJ[12] clearly use EU citizenship as a powerful driving force for an AFSJ.[13] The freedom to move has justified, first of all, the adoption of measures to ensure the security of citizens. Union law must guarantee that Union citizens can move freely from one Member State to another and enjoy an equal level of security everywhere. The emphasis on security has been criticised as privileging the interests of the State and disregarding the protection of the rights of the individuals affected.[14] Recently, EU citizens' concern for justice has also been taken into

[10] For example, the ordinary legislative procedure applies to these fields in general, but the extended EU competence as regards criminal law (Art. 83 TFEU) or issues concerning the establishment of a European Public Prosecutor (Art. 86 TFEU) still require unanimity in the Council; see Peers, 'Justice and Home Affairs Law Since the Treaty of Lisbon', in Acosta Arcarazo and Murphy (n.7).

[11] Art. 4(2)(j) TFEU. Nevertheless, Member States remain solely responsible for the maintenance of law and order and the safeguarding of internal security in application of Arts. 4(2) TEU and 72 TFEU.

[12] For example, European Council, 'The Stockholm Programme – An open and secure Europe serving and protecting citizens', OJ 2010 C115/1; see Azoulai and Coutts, 'Restricting Union Citizens' Residence Rights on Grounds of Public Security' (2013) 50 *CMLRev* 553.

[13] For an assessment, see Herlin-Karnell, 'Is the Citizen Driving the EU's Criminal Law Agenda?', in Dougan et al. (eds.) *Empowerment and Disempowerment of the European Citizen* (Hart, 2012).

[14] Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice' (2012) 31 *YEL* 319.

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consideration. In particular, the rights of persons involved in criminal proceedings – as part of the broader objective of developing a Europe of law and justice – has become a political priority.[15] The Union must ensure that movement will not result in a loss of rights including fundamental rights.[16] The adoption of measures in the AFSJ is triggered by the desire to remove obstacles to the exercise of EU citizenship rights.

This rationale is not only in line with the traditional economic cross-border logic which originated in the internal market and according to which, EU law protects those who migrate and are economically active,[17] but also with the findings of the ECJ generated in *Martínez Sala*, which detached citizenship rights from economic activity.[18] The rationale of the AFSJ goes even beyond this because it aims to offer protection to its citizens, which transforms the EU into a more protective polity.[19]

The opening of the internal borders in Europe not only facilitated free movement rights, but also created opportunities for the migration of criminal activities and criminals within the EU. In order to compensate for this, the Union strives to ensure that the citizens of the Member States are protected against crime and, when they are facing criminal justice, enjoy equivalent judicial safeguards anywhere in the Union. Like moving citizens, static citizens need security and justice against criminals who enjoy free movement rights.[20]

[15] See European Council, 'The Stockholm Programme', note 12 above, para. 1.1. implemented in Council of the European Union, 'Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings' (Council Document 11457/09, 1 July 2009).

[16] For example, in its proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime, the Commission referred to its 'EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights', COM(2010) 603 final, which assesses the obstacles to free movement of European citizens. According to the Commission's explanation of the proposal for the Directive 'strengthening victims' rights, together with the strengthening of procedural rights of suspects or accused persons in criminal proceedings reflects this approach [to dismantle obstacles for migrating European citizens to move]' (text between brackets added): European Commission, 'Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', COM(2011) 275 final, 2.

[17] Kochenov and Plender (n.2).

[18] C-85/96, *Martínez Sala*, EU:C:1998:217.

[19] Shaw, 'The Constitutional Development of Citizenship in the EU Context', in Pernice and Tanchev (eds.), *Ceci n'est pas une Constitution* (Nomos, 2009).

[20] The preambles of EU criminal legislation refer to the need of EU citizens for security; for example, Recital 3 Preamble to Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 2009 L294/20.

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The application of EU criminal law cannot be limited to cross-border proceedings and must also encompass criminal proceedings where all the elements of the case are confined in one Member State. It is therefore not surprising to observe an *ex post* spill-over effect to the rules adopted in the application of the competences granted to the EU under the AFSJ. Although the rationale of EU criminal law lies in a cross-border logic, in reality certain EU criminal measures apply indiscriminately in cross-border situations and in situations without a cross-border dimension. For example, under Article 82 TFEU,[21] the EU can adopt directives to facilitate cooperation in criminal matters having a cross-border dimension and grant rights to individuals in criminal procedure or to victims of crime, yet such directives could also be invoked in proceedings which are not cross-border, as this is not a condition for their application.[22]

These developments mark a radical departure from cross-border logic; but there is more. By affecting national criminal law, EU criminal law extends the scope of application of the Charter to internal proceedings, enhancing EU citizens' protection in national criminal justice.[23] In the AFSJ, the existence of a single citizenry at the *federal* level justifies a centralisation of the power to enact rules for the protection of this citizenry, but the protection offered by EU law should no longer be the preserve of transnationally engaged citizens. The next section shows that the AFSJ not only addresses the need for security and justice for EU citizens, but also offers protection to individuals in general, irrespective of their status as EU citizens, as long as they fall within the territorial scope of the AFSJ.

[21] The same reasoning applies to Directives approximating criminal offenses and sanctions adopted in application of Art. 83 TFEU.

[22] See, for example, Art. 1 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L315/57. By analogy, this is also what happened in cases concerning the interpretation of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, OJ 2001 L82/1; see for example, C-105/03, *Pupino*, EU:C:2005:386; C-79/11, *Giovanardi*, EU: C:2012:448.

[23] C-617/10, *Åkerberg Fransson*, EU:C:2013:105; Marguery, 'European Union Fundamental Rights and Member States Action in EU Criminal Law' (2013) 20 *MJ* 282. In more recent case law, however, the ECJ seems to be more hesitant to apply the CFR. See, e.g., C-416/10, *Križan*, EU:C:2013:8; C-206/13, *Siragusa*, EU:C:2014:126; and C-265/13, *Torralbo Marcos*, EU:C:2014:187.

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III To What Extent Does EU Criminal Law Affect EU Citizens?

The Treaty provides several tools to ensure freedom, security and justice, ranging from means to improve the coordination and cooperation of police and judicial authorities to a legal basis for the establishment of a European Public Prosecutor's Office. In particular,[24] it is interesting to focus on EU powers to implement the principle of mutual recognition and approximate the criminal law and procedure of the Member States;[25] the choice for these instruments is not only justified by the fact that they are closely linked to the EU citizens' free movement, but also by the fact that they have the potential to limit significantly the discretion of the Member States in criminal matters. How do these two tools actually affect EU citizens? Do they provide EU citizens with federal rights which will impact on the division of powers in the Union?

The principle of mutual recognition obliges Member States to accept the judicial decisions made by judicial authorities in other Member States and to attach to these decisions the same legal effects as to similar national decisions.[26] In other words, it allows the judicial authorities of a Member State, in particular the prosecution authorities, to extend their powers beyond the national jurisdiction in the fight against crime. By providing more powers to these authorities, mutual recognition strives to guarantee overall security on the territory of the states where it is binding. Its scope of application extends to all natural – and sometimes legal[27] – persons within the AFSJ regardless of whether they exercise the freedom to move.[28] Regardless of EU citizen status,

[24] See Art. 67(3) TFEU.

[25] In the field of cooperation in criminal matters, the ECJ uses the terms 'approximation' and 'harmonisation' interchangeably; see C-187/01 and C-385/01, *Gözütok and Brügge*, EU:C:2003:87; or C-399/11, *Melloni*, EU:C:2013:107. See, however, Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42 *CMLRev* 1567.

[26] Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *CMLRev* 1277.

[27] Several texts implementing the principle of mutual recognition can apply to a decision concerning either a natural or a legal person regardless of the nationality of this person. For example, on decisions requiring a financial penalty to be paid by a natural or legal person, see Art. 1 Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, OJ 2005 L76/16.

[28] Mutual recognition can also concern criminals or suspects who have never left their home country in the Union. For example, pursuant to Art. 3 Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, OJ 2003 L196/45, Member State A can request Member State B to freeze any property which Member State A considers as the proceeds of an offence. The same is true

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a convicted person or a person suspected of a crime must not escape efficient and rapid prosecution whatever his whereabouts in the Union.[29]

For example, under certain conditions, the European Arrest Warrant (EAW)[30] ensures that an individual, either an EU citizen or third-country national, who is suspected of having committed a criminal offence in Member State A is arrested and detained in Member State B, which will subsequently surrender him to Member State A. The discretion of national authorities to refuse requests from other states is limited. For example, a Member State, in principle,[31] cannot refuse to surrender its own nationals because they are viewed as EU citizens and not simply as citizens of this particular State.[32] Mutual recognition first grants all powers to public authorities, and, where it guarantees rights, this is for all individuals subject to the measure.

One of the other tools to create an AFSJ is approximation of national law by the EU, which in general consists of the establishment of minimum rules[33] by means of directives.[34] First, the EU enjoys competence to approximate substantive criminal law.[35] Directives can stipulate both the elements of a crime and its sanction. The criminalisation of a type of

with regard to Directive 2014/41/EU regarding the European Investigation Order in criminal matters, OJ 2014 L130/1, which will replace the Framework Decision.

[29] That is similar with regard to victims. See, for example, Directive 2011/99/EU on the European protection order, OJ 2011 L338/2.

[30] Council Framework Decision 2002/584/JHA on the European arrest warrant, OJ 2002 L190/1.

[31] However, as we will see below, Member States remain competent in certain circumstances to treat their nationals differently from foreign nationals.

[32] However, this was not a completely smooth process, as several Member States which used to protect their own nationals against extradition had to adapt their constitutions in one way or another; Komárek, 'European Constitutionalism and the European Arrest Warrant' (2007) 44 *CMLRev* 9.

[33] It should be noted, however, that uniform and exhaustive standards are sometimes adopted through EU secondary legislation. For example, with regard to the harmonisation of a certain aspect of the right to fair trial in the context of the EAW, e.g., the guarantee of a remedy in case of conviction *in absentia*, C-399/11, *Melloni*, paras 60–63 show that the Member States have lost their discretion to apply higher national levels of fundamental rights protection. In this sense, in the protection of this right, the Framework Decision became the maximum level of protection for citizens, rather than a minimum standard of protection, against the surrender to another Member State; see on this, Sarmiento, 'Who's Afraid of the Charter?' (2013) 50 *CMLRev* 1221.

[34] Since the Treaty of Lisbon, the legal instruments mentioned in Art. 288 TFEU can be used in the criminal AFSJ. Legislation adopted in this area before Lisbon, such as the Framework Decisions, will remain in force until they are repealed, annulled or amended; see Art. 9 Protocol 36 on transitional provisions, OJ 2012 C326/322.

[35] Art. 83 TFEU.

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behaviour is independent of the nationality of the individual who exhibited this behaviour, but Member States remain responsible for transposing this legislation into national criminal law, without which criminal liability cannot be founded.[36] Second, the EU enjoys a competence to approximate criminal procedure.[37] On the one hand, the protection of victims is ensured by the approximation of certain rights in criminal procedure,[38] and on the other hand, approximation may also concern the fundamental rights of individuals facing justice, such as fair trial rights.[39] Here too, all individuals enjoy the rights provided in these instruments.

The rules adopted under the competences of the AFSJ are justified by the desire to ensure security and justice in an area where citizens can move freely. Indeed, only serious crimes with a cross-border dimension can be subject to approximation,[40] and the criminal procedure of the Member States may only be approximated in order to facilitate mutual recognition and cooperation in cross-border situations. However, such measures apply to all individuals, whether EU citizen or not, having moved or not and economically active or not. Such a conclusion must be welcomed.[41] Nevertheless, there is a limit to this positive outcome because from a territorial perspective, the AFSJ remains fragmented.

[36] See Klip who outlines the question raised by 'minimum rules' in substantive criminal law. He contends, for example, that minimum harmonisation of criminal behaviours means that Member States must criminalise a particular behaviour, Klip (n.8), 165–70.

[37] Approximation of criminal procedure occurs indirectly through the implementation of the principle of mutual recognition, but also directly in application of Art. 82 TFEU.

[38] For example, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L315/57.

[39] At the time of writing, three Directives had been adopted applying the Council of the European Union's 'Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings' (Council Document 11457/09, 1 July 2009): approximating the right to translation and interpretation, the right to information and the right to access to a lawyer, respectively. Three proposals for a Directive are under discussion to ensure the procedural rights of children, the presumption of innocence and the right to legal aid, see "Rights of Suspects and Accused, available at http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm.

[40] Art. 83(2) TFEU also provides for the approximation of the criminal law of the Member States if it is essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. This provision may in particular be used in areas such as the facilitation of illegal entry and residence, ship-source pollution or environmental crime or employment of irregular migrants which also relate to free movement policies; see Peers (n.8), 791–94.

[41] This is in line with the conclusions of the Tampere European Council, which stressed that the AFSJ should not be regarded 'as the exclusive preserve of the Union's own citizens': European Council, 'Presidency Conclusions, Tampere European Council of 15 and 16 October 1999', para. 3.

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Even though the compositeness of the Union as a system consisting of the Member States' legal systems means that territorial jurisdiction is divided between the Member States and the Union,[42] Article 67 TFEU refers to the Union as constituting *one area.*[43] However, this unity in diversity is a fiction. Certain Member States have the right not to participate in the AFSJ. Therefore, the territorial scope of the AFSJ does not cover all Member States.[44] As a consequence, the scope of application of EU criminal law does not offer a level playing field for all citizens of the EU. This outcome is regrettable, as it runs counter to the above-mentioned promise of an AFSJ protecting a single citizenry including all the peoples of the EU Member States.

Moreover, with regard to EU measures on policing and criminal law adopted after the Treaty of Lisbon, Denmark, the UK and Ireland have secured 'opt-ins' which exacerbates this fragmentation.[45] Denmark is neither bound by Directive 2011/36/EU on preventing and combating trafficking in human beings[46] nor by Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography.[47] Consequently, rules governing these criminal offences and the jurisdiction relating to them can diverge within the Union and

[42] The fragmentation is further increased, if we consider that the UK consists of three separate criminal legal systems: England and Wales, Scotland and Northern Ireland; for an overview, van den Wyngaert, *Criminal Procedure Systems in the European Community* (Butterworths, 1993).

[43] On the notion of AFSJ, see Bot, *Le mandat d'arrêt européen* (Groupe de Boeck, 2009), 34–40.

[44] In some cases, parts of the territory of the Member States covered is excluded from the Area: Fletcher, 'EU Crime and Policing and the OCTs', in Kochenov (ed.), *EU Law of the Overseas* (Kluwer, 2011). In addition, certain aspects of the AFSJ also apply to non-EU Member States. For example, in the application of the Schengen Association Treaty, Norway and Iceland are bound by certain measures concerning policing and criminal law as provided in the 1985 Schengen Agreement and the 1990 Convention on the Application of the Schengen Agreement. See Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*, OJ 1999 L176/36.

[45] Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ 2012 C326/295; and Protocol 22 on the position of Denmark, OJ 2012 C322/299.

[46] Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L101/1.

[47] Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L335/1.

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offer different levels of protection.[48] Citizens may not be able to invoke the protection of the Charter in the context of proceedings concerning such crimes in these Member States because the proceedings will not fall within the scope of these directives.

Even though the AFSJ is fragmented territorially, the need to consider the European dimension of citizenship has indeed shaped the repartition of powers between the EU and its Member States in criminal matters. In particular, the Area addresses EU citizens' need to move in a safe and secure area where justice is guaranteed. Nevertheless, nothing in this legislation seems addressed to EU citizens in particular. The AFSJ does not grant EU citizens with rights associated with their status. All individuals are subject of EU criminal law. EU citizens cannot claim a right to security and justice associated with their status as such. This conclusion is important considering the developments brought about by *Ruiz Zambrano* in what belongs to the substance of the rights of EU citizens, which will be addressed in the next section.[49]

Another conclusion is that although the core rules on criminal law are established at the EU level, Member States remain competent to an important extent to shape their criminal legal systems and to implement EU criminal law, which is in accordance with Article 67(1) TFEU, which obliges the Union to respect the different legal systems and traditions of the Member States. This division of competences in EU criminal law suits the federal perspective of the EU. The European Union aims to create an AFSJ, but the substance of that Area depends on the choices made by the Member States. The national competence to govern criminal matters is however limited by the Treaty freedoms, and by EU citizenship. The next section also reveals that this *national* competence is affected by some of the supranational rights of EU citizens, such as the right not to be discriminated against on grounds of nationality and the right to free movement.

[48] Divergence can also occur because of inefficient or the complete lack of transposition, see Weyembergh and Santamaria, *The Evaluation of European Criminal Law* (Editions de l'Université de Bruxelles, 2009).

[49] C-34/09, *Ruiz Zambrano*, EU:C:2011:124.

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IV The Impact of EU Citizens' Rights on Criminal Law

A Impact of the Principle of Non-Discrimination on Grounds of Nationality

No Member State's criminal law may discriminate against citizens because of their nationality. Moreover, EU law does not generally allow restrictions to the free movement of Union citizens.[50] The Member States' discretion to regulate their criminal law and procedures is limited by the principle of non-discrimination on grounds of nationality. Two cases exemplify this limitation.

Before the formal introduction of Union citizenship into the Treaties and the creation of an AFSJ, the ECJ had already assigned a role for the rights of Member State nationals in the field of criminal law. One of the early cases in which this role became clear was *Cowan*.

Cowan was a British tourist in France who was mugged while leaving a French subway station. According to French criminal law, compensation for harm suffered in such circumstances could only be granted if the victim was of French nationality, held a residence permit or was a national of a country which had entered into a reciprocal agreement on the matter with France. The UK and France had no such a reciprocal agreement. Considering that Cowan was a recipient of services and, therefore, fell within the scope of application of the free movement of services, the ECJ asserted that

> [a]lthough in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.[51]

That means that Member States have to adjust their national criminal law and remove any unjustified discriminating elements. In this case, the Court found no legitimate interest that would have justified discrimination, such as the principle of national solidarity which would mean that the right granted under national criminal law implied a 'closer bond with the state than that of a recipient of services'.[52]

[50] With regard to that development in case law, see Jacobs, 'Citizenship of the European Union' (2007) 13 *ELJ* 591.

[51] 186/87, *Cowan*, para. 19. [52] Ibid., para. 16.

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Hence, while Member States have competence to act in criminal law, their sovereignty is limited by the prohibition of discrimination on grounds of nationality, whenever a given situation falls within the scope of EU law. The same holds true for situations where Member States enjoy some discretion when sharing their competence with the EU in criminal matters. In order to activate the applicability of this prohibition, a national measure or situation has to fall within the scope of Union law. This is where EU citizenship can play an important role, connecting criminal law with the scope of EU law.

The *Wolzenburg* case reveals the influence of the principle of non-discrimination on grounds of nationality in conjunction with European citizenship on national criminal law implementing the EAW.[53] This case concerned the discretion of a Member State not to surrender a national or a resident sentenced in another Member State pursuant to an EAW if the former Member State undertook to execute the sentence. As seen earlier, in principle the Member States cannot refuse to surrender their nationals. Nevertheless, an exception to this rule is possible. An executing state may refuse to surrender a national or a migrant residing in that state where an EAW has been issued for the purpose of execution of a sentence or detention order, if that state undertakes to execute that sentence or order.[54] Member States remain competent to determine who is subject to this provision.

Two German courts found Wolzenburg, a German national residing in the Netherlands, guilty of importing marijuana into Germany and sentenced him to jail. The German authorities requested the Dutch authorities to surrender Wolzenburg so that he could serve his prison sentence in Germany. According to Dutch law, surrender could only be refused for a Dutch national or a foreign national holding a residence permit of indefinite duration, which Wolzenburg did not have.[55] The referring court asked the ECJ whether the Dutch condition of residence was in line with EU law since the Framework Decision on the

[53] C-123/08, *Wolzenburg*. See Herlin-Karnell, 'Case Comment: *Wolzenburg* C-123/08' (2010) 73 *MLR* 824.

[54] Such a 'return guarantee' is provided in Arts. 4(6) and 5(3) Council Framework Decision 2002/584/JHA.

[55] Moreover, Dutch law grants national courts the power to refuse or accept surrender insofar as the person may be prosecuted in the Netherlands for the offences on which the EAW is based and insofar as it can be expected not to forfeit the right of residence in the Netherlands as a result of any sentence or measure which may be imposed on the individual after surrender. We could query whether these conditions also conformed with the EAW, but the ECJ did not provide an answer.

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EAW does not set any specific condition concerning the length of residence or the need to hold a residence permit.[56]

Wolzenburg had exercised his right to move to and reside in another Member State, on the basis of Article 21 TFEU, therefore his situation fell within the scope of Union law, triggering the application of Article 18 TFEU. He could thus invoke the prohibition of discrimination on the ground of nationality against Dutch law.[57] The ECJ held that the additional requirement of having a residence permit of indefinite duration did not conform with EU law,[58] referring to the fact that an EU citizen has a right to permanent residence after five years in a host Member State, based on Directive 2004/38.[59]

However, the Court ruled that a Member State can still require that an EU citizen should have been residing on its territory for a certain period, in order to enjoy the right to execute his sentence in the Member State of residence and to distinguish between those EU citizens who have sufficiently integrated in the host Member State's society and those who have not. Member States may derogate from the prohibition of discrimination on grounds of nationality when a Union citizen has not sufficiently integrated and, therefore, has no real link with the host Member State. A period of five years ensures that non-Dutch nationals are integrated into Dutch society and, accordingly, that period is likely to ensure 'their social reintegration after the sentence imposed on them has been enforced'.[60] In the context of the EAW, the longer an EU citizen resides in a Member State other than his state of origin, the more integrated in that state he will be and the more protection against surrender he enjoys.

From an EU citizenship perspective, this development is welcome, since the rationale for the protection offered to EU citizens here extends beyond economic reasons[61] and secures one of the functions of special

[56] Art. 4(6) Council Framework Decision 2002/584/JHA provides for an optional ground for non-executing a EAW, if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

[57] It is worth noting that the situation already fell within the scope of EU law by the mere fact that the Netherlands was implementing EU law, but the questions referred by the national court did not request an interpretation of national law in the light of Art. 21(2) CFR.

[58] C-123/08, *Wolzenburg*, para. 52.

[59] Directive 2004/38/EC on the right of citizens of the Union, OJ 2004 L158/77.

[60] C-123/08, *Wolzenburg*, para. 70.

[61] Economic activity is no longer required to enjoy the resident status; see Art. 16 Directive 2004/38/EC; and also C-66/08, *Kozłowski*, EU:C:2008:437, para. 48.

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prevention that can be attached to a criminal sanction.[62] At the same time, national criminal law is respected, but protection needs to be granted equally. In this approach, the emotional ties that can exist between the citizen and the host Member State are taken into account. The more integrated in the host Member State a Union citizen is, the less fair it seems that this citizen should be surrendered to carry out his sentence in his Member State of nationality. This approach of the Court is in line with Directive 2004/38, which provides protection against removal based on the period of residence.[63] Similarly, the ECJ held in the case *Petruhhin*[64] that the right to free movement of EU citizens would be breached if, without an objective and proportionate justification, a national of another Member State would be extradited to a third country, whereas the own nationals in the same circumstances would be protected. Mr Petruhhin had the Estonian nationality and moved to Latvia. This latter Member State accepted a request for extradition by the Russian authorities. The ECJ held that since Mr Petruhhin migrated from one to another Member State his situation was brought within the scope of EU law and therefore within the application of the principle of non-discrimination. [65]

The impact of EU citizens in criminal law is here very clear: after having moved from his state of nationality to another Member State an EU citizen has the right to be treated as a quasi-national.[66] On the basis of the principle of non-discrimination, Union citizens may claim certain protective rights with regard to criminal law in the European Union, at least in the sense that they may claim equal treatment on grounds of nationality. Criminal law of the Member States should provide equal protection to *all* EU citizens, at least when the situation falls within EU law. The content of these protective rights depends, however, on the national law. If that law allows for criminal injuries compensation (*Cowan* case) or for protection against surrender of nationals in the context of the EAW (*Wolzenburg* case), also other EU citizens in the jurisdiction of that Member State must enjoy these rights. Two points in

[62] De Kerchove, 'Les Fonctions de la Sanction Pénale' (2005) 127 *Information Sociale* 22.
[63] See Arts. 27 and 28 Directive 2004/38/EC. One may nevertheless raise the question whether the citizen would not be more adequately protected under the regime of Art. 7 CFR or Art. 8 ECHR concerning the respect of family life.
[64] C-182/15, *Petruhhin*, EU:C:2016:630. [65] Ibid., paras 31–33.
[66] van der Mei and Muir, 'The EU Citizenship Dimension of the Area of Freedom, Security and Justice', in Luchtman (ed.) *Choice of Forum in Cooperation Against Financial Crime* (Eleven International, 2013).

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respect of non-discrimination of EU citizens are important to bear in mind. First, the purpose of the principle of non-discrimination is not to ensure security and justice of all individuals in the fight against crime. Second, only moving EU citizens can enjoy this protection.

B Non-Discriminatory Restrictions on Free Movement

Beyond discrimination, Member States' legislation must not deter or hinder free movement of citizens. Article 21 TFEU prohibits restrictions to the free movement of non-economically active EU citizens. Therefore non-discriminatory restrictions which arise from national criminal law need to be objectively justified in order to be accepted under EU law.[67] However, whether all restrictions to free movement actually fall under the prohibition not to hinder the free movement of EU citizens is unclear. For example, to what extent can a restriction to *future* movement be prohibited? Although the ECJ has stretched the scope *ratione materiae* of EU law to an extent that allows more protection for citizens, in particular by expanding the variety of cross-border situations, so far the ECJ's answer to this question remains uncertain.[68]

In criminal law, it would be relevant for example, to know whether the non-respect of fundamental rights in criminal proceedings by a Member State could be considered as a restriction to this freedom.[69] Trust in the

[67] In this context, we should also mention the rules governing the protection against expulsion of EU citizens laid down in Chapter VI of Directive 2004/38 which for space reasons will not be discussed in this chapter, though they raise interesting questions concerning the grounds for expulsion of EU citizens having lived more than ten years in the state of residence; see on this, Azoulai and Coutts (n.12).

[68] See Kochenov and Plender (n.2); Kochenov, 'Citizenship Without Respect', *Jean Monnet Working Paper* 08/2010, 34–54.

[69] It should be noted that individuals are traditionally protected against extradition or expulsion under the ECHR. First, a network of extradition treaties currently regulates extraditions. Member States must in any case ensure that the rights of the individual under the ECHR, in particular the right against inhuman and degrading treatment guaranteed under Art. 3, will not be infringed in the state to which this person will be extradited; see *Soering* v. *United Kingdom*, App. No. 14038/88 (1989). Moreover, the right to family life guaranteed in Art 8 ECHR protects individuals against expulsion following a criminal conviction, which is considered an interference with that right by the ECtHR and which must therefore be provided by law, be necessary in a democratic society and be proportionate to the legitimate aim pursued. In particular, after several judgments, the ECtHR has clarified which factors must be taken into consideration in the balancing test performed by the national authorities when deciding on expulsion; see *Üner* v. *Netherlands*, App. No. 46410/99 (2006), para. 57; see also *Moustaquim* v. *Belgium*, App. No. 12313/86 (1991), paras 43–47; *Beldjoudi* v. *France*, App. No. 12083/86 (1992),

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respect of fundamental rights by the judicial systems of the Member States may be a condition for Union citizens to actually use their free movement rights.[70] In this regard, in its proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime,[71] the European Commission referred to the EU Citizens' Report of 2010,[72] in which the obstacles to free movement of European citizens are assessed. Although in the text adopted, no explicit reference is made to European citizens as beneficiaries of the minimum standards,[73] according to the Commission's explanation of the proposal '[s]trengthening victims' rights, together with the strengthening of procedural rights of suspects or accused persons in criminal proceedings reflects this approach [to dismantle obstacles for migrating European citizens to move]'.[74] It has therefore been argued that the non-respect of fundamental rights by a Member State could constitute a barrier to EU citizens' *potential* movement within the Union.[75]

There is no settled answer to this question. Extending the case law on free movement to potential free movement seems to cross a sensitive line, as this would involve an assessment of what constitutes such a barrier, meaning that the ECJ and national courts would need to weigh the

paras 74–80; see Sherlock, 'Deportation of Aliens and Article 8 ECHR' (1998) 23 *ELRev* 62; and for an overview, Peers (n.8), 400–03. See on this point also, van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law, 2015), 138–39. It should be mentioned here that following C-411/10 and C-493/10, *N.S.*, EU: C:2011:865, it has been argued that the automatic transfer of individuals through cooperation in criminal matters based on mutual trust is not possible. National courts are under a duty to check whether the transfer of a suspected or convicted person to another Member State would actually breach that person's fundamental rights, on a case-by-case basis; see Mitsilegas (n.14).

[70] See, for example, European Commission, 'Commission staff working document – Proposal for a Council Framework Decision on the right to interpretation and translation in criminal proceedings – Impact assessment', SEC(2009) 915, para. 74, which states that a new instrument with broad procedural rights 'would mean that EU citizens could be sure that they would have the same rights in other Member States in criminal proceedings as they do in their own Member State [if it was adopted and implemented in all Member States]'.

[71] European Commission, 'Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', COM(2011) 275 final.

[72] European Commission, 'EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights', COM(2010) 603 final.

[73] Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L315/57.

[74] European Commission (n.71), 2 (text between brackets added).

[75] In this sense, see C-168/91, *Konstantinidis*, Opinion of AG Jacobs, EU:C:1992:504; and C-380/05, *Centro Europa*, Opinion of AG Poiares Maduro, EU:C:2007:505, paras 20–22.

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impact of a national measure in light of the decision of a Union citizen not to move.

In contrast, in *Kremzow*, decided in 1997, the Court clearly refused to consider a violation of fundamental rights in criminal proceedings in a purely internal situation as a restriction on a *purely hypothetical* movement of Union citizens. The proceedings concerned an Austrian citizen convicted and sentenced to jail for life in violation of Article 6 of the European Convention on Human Rights (ECHR) by an Austrian court in the application of national criminal law. Pursuant to Austrian law, no claim for compensation could arise out of the decision of the court which found Kremzow guilty. According to Kremzow, the illegal detention had restricted his right to free movement and, consequently, he was entitled to compensation on the basis of EU law. The ECJ held nevertheless that a purely hypothetical prospect of exercising the right to free movement 'does not establish a sufficient connection with [EU] law to justify the application of [EU] provisions'.[76] In order to invoke the protection of EU law – including EU fundamental rights – in criminal law, the existence of a barrier to hypothetical movement seems insufficient; EU citizens must fall otherwise within the scope of Union law.[77]

In addition to the role of the free movement of EU citizens and its effect on national discretion, another question which can be posed is whether Article 20 TFEU can have an impact on national criminal proceedings where there is no actual movement of EU citizens. The case law of the ECJ with respect to Article 20 TFEU raises new questions on fundamental rights, the division of powers and criminal law, to mention only a few of the issues. It boils down to whether the line of case law in *Ruiz Zambrano*[78] and subsequent cases can create a new connection between EU citizenship and criminal law.

[76] C-299/95, *Kremzow*, para. 16 (text between brackets added).

[77] For example, when a Member State enforces the failure to meet an obligation stemming from EU law by criminal sanctions, such sanctions would be disproportionate if they amounted to a restriction to the freedom of establishment. In *Skanavi* within the context of the obligation to exchange driving licences pursuant to Directive 80/1263, the ECJ held that Art. 49 TFEU precludes a Member State to from punishing by imprisonment or fine a national of a Member State who did not exchange her foreign driving license in time, as this *could have* consequences on the exercise of a trade or profession by this person which would further constitute a lasting restriction on freedom of movement. The ECJ, however, held that the free movement right in Art. 21 TFEU was residual, and was not the starting point for an analysis of the constitutional nature of free movement; see C-193/94, *Skanavi*, EU:C:1996:70.

[78] C-34/09, *Ruiz Zambrano*.

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C Ruiz Zambrano *and the AFSJ: An Unexplored Link?*

As pointed out in this book in several contributions,[79] in *Ruiz Zambrano* the ECJ introduced the 'substance of the rights' test,[80] ruling that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[81] Therefore, the material scope of Union law is extended with the rights granted to Union citizens, irrespective of free movement. It is consequently essential to define what the substance of the rights of Union citizens entails.[82]

One of the issues debated extensively in academic writing is whether fundamental rights can be included in what belongs to the 'substance of the rights' of Union citizens.[83] In the specific context of criminal law, an important question is whether the right to a safe and secure Union could be one of these essential EU citizenship rights. Nevertheless, so far the ECJ has not interpreted Article 20 TFEU in this direction, rather appearing to have stepped back from the initially promising test introduced in *Ruiz Zambrano*.[84]

The Court seems to interpret the scope of Article 20 TFEU as only covering situations where a EU citizen is forced to leave the territory of the EU as a whole, not the territory of a particular Member State.[85] More recent ECJ case law confirms the narrow interpretation of the 'substance of the rights' of EU citizens.[86] Moreover, as we have seen above, rights in the criminal AFSJ are provided to all individuals and not to EU citizens in particular. It does not yet seem possible to formulate a right to security and justice under the essential rights of Union citizens.[87] The fact that the

[79] For example, Davies in this volume. See further the introduction to this volume.

[80] See also Kochenov, 'The Right to Have *What* Rights?' (2013) 19 *ELJ* 502; Hailbronner and Thym, 'Case Note C-34/09, *Ruiz Zambrano*' (2011) 48 *CMLRev* 1253.

[81] C-34/09, *Ruiz Zambrano*, paras 41–42.

[82] Kochenov (n.80).

[83] *Inter alia*, ibid.; van Eijken and de Vries, 'A New Route into the Promised Land?' (2011) 36 *ELRev* 704; Hailbronner and Thym (n.80); Wiesbrock, 'Disentangling the "Union Citizenship Puzzle"?' (2011) 36 *ELRev* 861.

[84] Nic Shuibhne, '(Some Of) the Kids Are All Right' (2012) 49 *CMLRev* 349 and Nic Shuibhne in this volume.

[85] Nic Shuibhne, '(Some Of) the Kids' (n.84); see also C-86/12, *Alokpa*, EU:C:2013:645, paras 32–36.

[86] C-86/12, *Alokpa*, para. 32 (emphasis added).

[87] Art. 6 CFR guaranteeing the rights to liberty and security should be mentioned in this context. However, such rights are the rights guaranteed by Art. 5 ECHR to all individuals. The current case law of the ECJ does not interpret the concept of the 'substance of EU citizens' rights' as including these fundamental rights.

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ECJ leaves the actual assessment up to national courts implies that national discretion with regard to the expulsion of non-nationals is greatly respected by the ECJ. From a federal perspective, this respect for national choices and the assessment of national courts is to be applauded, but in the meantime, some may contend that it is disappointing from the viewpoint of a true and meaningful EU citizenship. Nevertheless, considering fundamental rights as belonging to the substance of the rights of EU citizens will not benefit third-country nationals, which could be subject to challenge from criminal law perspective.

The link between *Ruiz Zambrano* and criminal law is still difficult to establish. Even if a Union citizen is expelled from one Member State, in the context of national criminal law, this does not necessarily lead to de facto expulsion from the *whole* territory of the European Union.[88] However, in certain circumstances we could argue that legislation in the field of criminal law could lead to deprivation of the substance of the EU citizenship rights. For example, to what extent can the extradition of an EU national to a third country be considered as depriving this citizen of the substance of his rights? We could also consider situations where EU citizens are sentenced to life imprisonment. In such situations, a connection could also be found in the context of free movement of EU citizens, on the basis of Article 21 TFEU. If a Union citizen were confronted with severe punishment, we could also argue that these criminal law provisions prevent a Union citizen from moving and residing freely in the territory of the EU.

In respect of the federalising effect of EU citizenship in criminal law another case can be mentioned: the case Delvigne.[89] The ECJ ruled in that judgment that Article 39(2) Charter may grant EU citizens a right to vote for the European Parliament, irrespective of whether they exercised their free movement rights.[90] The case concerned a voting ban for prisoners in French criminal law and the ECJ's ruling affects therefore national

[88] In contrast with EU citizens, third-country nationals do not benefit from this protection and can be expelled from the territory of the Union; see Cholewinski, 'The Criminalisation of Migration in EU Law and Policy', in Baldaccini et al. (eds.), *Whose Freedom, Security and Justice?* (Hart 2007).

[89] C-650/13, *Delvigne*, ECLI:EU:C:2015:648.

[90] The case reveals the potential of EU citizens' rights in a federal perspective in criminal law. This contribution will, for reasons of length, not discuss this judgment in-depth, see Van Eijken and Van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?' (2016) 12 *European Constitutional Law Review* 114.

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criminal law. Both, Ruiz Zambrano and Delvigne show the potential of ECJ's case law to grant EU rights to EU citizens who have not moved.

V Conclusion

To what extent do EU citizenship and the AFSJ shape the criminal law and procedure in the Member States and protect those in possession of this status? An answer to this question runs in two directions. Firstly, relying on the citizens' need for security and justice, emphasised by the opening of borders in the EU and by the facilitation of the free movement of persons, Member States have decided to centralise some of their powers in criminal matters within an AFSJ which achieves a new level of EU integration within a EU citizenship logic.

Such centralisation results in a growing body of EU criminal law addressing common fundamental values such as the protection against serious crimes and against violations of fundamental rights. EU criminal law circumscribes Member State discretion to regulate criminal law. These fresh steps taken by the Member States down the path of integration must be applauded, since they guarantee to all individuals the protection of a common core of fundamental rights and values within a single area while respecting the diversity which characterises the constituent elements of this area. This course not only strives to ensure the security of everyone against crime, but it also ensures equivalent protection of those who encounter criminal justice either as suspects or victims. Ultimately escaping cross-border logic, this phenomenon seems adapted to ensure adequate protection of individuals in criminal matters, provided that a balance between security and justice is respected. Progress in this direction is significant and must continue. On a more critical note, the special arrangements negotiated by certain Member States with regard to the AFSJ are questionable, as they can affect citizens' protection against violations of the common values and fundamental rights in the Union.

The second direction discussed in this chapter is the impact on Member States' competence in criminal matters of the existing EU citizens' right not to be discriminated against on grounds of nationality and the right to free movement. The Member States' competence to regulate their criminal laws remains limited in any case by the Treaty freedoms and the supranational rights of EU citizens. Member States must offer the protective rights granted in their criminal legislation to all EU citizens. In contrast to EU criminal law, such protection is not always

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adequate in the context of national criminal law because individuals who do not enjoy the status of EU citizens are excluded from its scope of application. Moreover, that protection is still encapsulated within the cross-border logic and therefore excludes nationals in purely internal situations from its scope. The 'substance of the rights' doctrine emerging from the *Ruiz Zambrano* case does not change this latter conclusion and remains important in criminal matters. Several reasons account for that, in particular the fact that EU criminal law does *not* grant specific rights to EU citizens because of their status and also the fact that the substance of EU citizenship rights does not yet extend to fundamental rights. However, the substance of the rights-test as introduced by the ECJ has potential to created more federal effects, also in the field of criminal law.[91] As the judgment in Delvigne reveals, also outside the scope of free movement EU citizenship rights may have such effect on national criminal law.

[91] See also Van den Brink in this volume.

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