



Kaie Rosin

*Junior Lecturer of Criminal Law
University of Tartu*

The Relationship between EU Law and Fundamental Principles of Estonian Substantive Criminal Law

1. Introduction

In the field of criminal law, the treaties of the European Union^{*1} enshrine a carefully negotiated balance of powers. According to Article 4(2) of the Treaty on the Functioning of the European Union (TFEU), competence in the area of freedom, security, and justice is shared between the member states and the European Union. Although the Lisbon Treaty expanded the latter's criminal-law competence, it also codified general agreement that European Union legislation should not have the effect of changing the member states' legal systems and altering the fundamental characteristics of their criminal law.^{*2} Article 67(1) TFEU even states that in constituting the area of freedom, security, and justice the European Union shall respect the individual legal systems and traditions of the member states. Article 83 TFEU, which allows the adoption of minimum rules pertaining to the definition of criminal offences and sanctions, likewise demonstrates that the member states have agreed to approximate their substantive criminal law to only a certain extent.

Although the EU has no explicit competence to harmonise national principles of criminal law, there are many ways in which the EU law and national criminal law are interconnected more deeply than just at the level of minimum standards adopted from directives. Article 6(3) of the Treaty on European Union (TEU) states that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and proceeding from the constitutional traditions common to the member states, shall constitute general principles of the union's law. The Charter of Fundamental Rights of the European Union (or 'the Charter') sets forth principles of criminal law that correspond to the ones guaranteed by the ECHR.^{*3} That means that the principles of substantive criminal law are recognised and interpreted in the case law of the Court of Justice of the EU (CJEU)^{*4} and, therefore, EU law does have the capacity to affect principles of substantive criminal law – via a back door.

¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326.

² André Klip, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016) 178–180.

³ Piet Hein van Kempen and Joeri Bemelmans, 'EU Protection of the Substantive Criminal Law Principles of Guilt and Ne Bis in Idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework' [2018] 9(2) *New Journal of European Criminal Law* 248, 252–254. – DOI: <https://doi.org/10.1177/2032284418778146>.

⁴ On the competence of the CJEU, see Klip (n 2) 133–136.

This article examines the relationship between EU law and fundamental principles of Estonian substantive criminal law. The discussion begins with explanation of how the dialogue among the European Court of Human Rights (ECtHR), the CJEU, and the member states shapes the standard of protection of human rights and the principles of criminal law that are protected by the ECHR. Next, the analysis brings in the controversial position of the fundamental principles of substantive criminal law in the EU legal order, since the Treaty of Lisbon made the Charter legally binding but at the same time introduced a special ‘emergency-brake’ procedure to protect the fundamental principles of member states’ criminal law. The final portion of the paper narrows the focus to five principles specific to substantive criminal law that are derived from the fundamental principles⁵ articulated in the Estonian Constitution⁶ and have equivalents in human-rights law: the principle of legality of criminal law, the principle of retroactive application of the more lenient criminal law, the proportionality principle, *ultima ratio*, and the principle of individual guilt.⁷ The existence of the equivalent of these five principles in EU criminal law is examined in aims of demonstrating that the relationship between EU law and the individual principles of substantive criminal law is not uniform. As it would be beyond the scope of this article to offer an exhaustive list of the fundamental principles of criminal law, the analysis concentrates on these five principles, which together form the foundation for a set of various sub-principles and rules of Estonian substantive criminal law.⁸ While the analysis does not cover principles of criminal procedure, one should bear in mind that they may manifest aspects with significance for substantive criminal law.⁹

2. Estonian criminal law in the regulatory triangle

Although the competence to adopt criminal law has traditionally belonged to the state, the European Convention on Human Rights and the case law of the ECtHR have significantly restricted the power to adopt criminal law and influenced the development of national principles of criminal law.¹⁰ In a difference from the domain of criminal-law procedure, the human rights do not directly influence substantive criminal law but do entail restrictions to criminalisation and the application of sanctions.¹¹ Also, the states must criminalise certain acts if they wish to protect human rights, and failure to do so constitutes a breach of human-rights obligations.¹²

Similarly to the ECHR, the Charter specifies fundamental rights, all of which are potentially relevant for substantive criminal law in that their articulation imposes limits to the kinds of conduct the legislator may criminalise, and principles that are of specific relevance for substantive criminal law.¹³ The ECHR sets minimum standards, and the EU may opt for a higher level of protection within the limits set forth for application of the Charter.¹⁴ Therefore, the criminal-justice systems of the member states of the EU are shaped by the regulatory triangle in which the domestic level, the EU, and the Council of Europe’s legal order interact.¹⁵ The member states of the EU may choose a higher standard of protection than the ECHR’s

⁵ Human dignity, democracy, the rule of law, the social state, and the Estonian identity are acknowledged as the fundamental principles of the Constitution. See Madis Ernits and others, ‘The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law’ in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press 2019) 889. – DOI: https://doi.org/10.1007/978-94-6265-273-6_19.

⁶ Eesti Vabariigi põhiseadus [The Constitution of the Republic of Estonia], RT I, 15.05.2015, 2.

⁷ The impact of the EU law on the principles of jurisdiction (ss 6-9 of the Penal Code) is not covered by this article. On jurisdiction-related principles in EU criminal law, see Klip (n 2) 208–218.

⁸ On the elements of crime derived from the principle of legality of criminal law and the principle of guilt, see Jaan Sootak, ‘The Concept of Crime and Estonian Criminal Law Reform’ [1996] *I Juridica International* 55–62.

⁹ On the dual nature of the principle of *ne bis in idem*, see Jaan Sootak, *Karistusõigus. Üldosa* (Juura 2018) 119–121.

¹⁰ John AE Vervaele, ‘European Criminal Justice in the European and Global Context’ [2019] *10(1) New Journal of European Criminal Law* 7, 8–10. – DOI: <https://doi.org/10.1177/2032284419840708>.

¹¹ Steve Peers, *EU Justice and Home Affairs Law, Volume II: EU Criminal Law, Policing, and Civil Law* (OUP 2016) 172. – DOI: <https://doi.org/10.1093/acprof:oso/9780198776840.001.0001>.

¹² *Ibid.*

¹³ Van Kempen (n 3) 248, 252–254.

¹⁴ John AE Vervaele (n 10) 9–10.

¹⁵ *Ibid.*

as long as they ensure fulfilment of their obligations under European Union law and the national rules do not undermine the uniformity and effectiveness of the EU legal order.^{*16}

However, the road by which fundamental rights entered the union's law has been rocky. In *Stork*^{*17}, the CJEU refused to consider the argument that a decision by the High Authority of the Economic Coal and Steel Community breached basic rights that were protected under German law.^{*18} The CJEU changed its approach in the *Stauder*^{*19} case, by stating that fundamental rights are enshrined in the general principles of European Community law protected by the Court.^{*20} The Maastricht Treaty formally recognised human rights as part of EU law, and the Charter was drafted and proclaimed in the wake of the adoption of the Amsterdam Treaty.^{*21} The Lisbon Treaty rendered the Charter legally binding, and human rights were identified as a foundational value in Article 2 of the TEU.^{*22}

The Estonian criminal-justice system was built in the domain of the regulatory triangle described above. After the 20 August 1991 restoration of independence, Estonia started to reconstruct its justice system and reform its criminal law with the goal of integrating Estonia into the European legal system and creating a regime of criminal law that is based on the rule of law.^{*23} Two important steps in this process were adopting the Constitution of the Republic of Estonia^{*24} and ratifying the ECHR^{*25}. The new Penal Code entered into force on 1 September 2002.^{*26} According to Section 3 of the Estonian Constitution, the generally recognised principles and norms of international law had become an inseparable part of the Estonian legal system. From the decisions of the Supreme Court of Estonia from 30 September 1994^{*27} and 24 March 1997^{*28}, one can conclude that generally recognised principles of European law were considered fundamental to the Estonian legal system even prior to the country's accession.^{*29} The Supreme Court of Estonia continued the EU-friendly approach after Estonia acceded to the European Union, on 1 May 2004.^{*30} Before Estonia's accession to the EU, the relationship between the Estonian Constitution and EU law received great attention in the academic literature. Legal experts debated the function and role of Estonian constitutional principles in the European legal order and the way the Constitution should be amended.^{*31} Although accompanied by much criticism, a pragmatic choice was made in favour of a separate Constitution Amendment Act (CAA).^{*32} The CAA features a 'protective clause' stating that Estonia may belong to a European Union that respects the fundamental principles of the Estonian Constitution.^{*33} As the CAA did not address difficult questions about the impact of the EU legal order on the Constitution of Estonia, the debate over the hierarchy of law within the EU legal order continues to flare up again from time to time.^{*34} Also, the question of

¹⁶ Ibid.

¹⁷ Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] para 17. ECLI:EU:C:1959:4.

¹⁸ Gráinne de Búrca, 'The Road Not Taken: The EU As a Global Human Rights Actor' [2011] 105 *AJIL* 21. – DOI: <https://doi.org/10.5305/amerjintelaw.105.4.0649>.

¹⁹ Case 29/69 *Stauder v City of Ulm* [1969] ECLI:EU:C:1969:57.

²⁰ De Búrca (n 18) 21–23.

²¹ Ibid 25.

²² Ibid 1.

²³ Jaan Sootak and Priit Pikamäe, 'Estonian Criminal Law: Reform As a Path to Independence' [2000] 8(1) *European Journal of Crime, Criminal Law and Criminal Justice* 61–78. – DOI: <https://doi.org/10.1163/15718170020519049>; Julia Laffranque, 'European Human Rights Law and Estonia: One- or Two-way Street?' [2015] 23 *Juridica International* 4–5. – DOI: <https://doi.org/10.12697/ji.2015.23.01>; Jaan Sootak, 'Estonian Criminal Law As a Component of International Criminal Law' [1998] 3 *Juridica International* 53–54.

²⁴ Eesti Vabariigi põhiseadus [The Constitution of the Republic of Estonia], RT 1992, 26, 349.

²⁵ Inimõiguste ja põhivabaduste kaitse konventsioon [Convention for the Protection of Human Rights and Fundamental Freedoms], RT II 1996, 11, 34.

²⁶ Karistusseadustik [Penal Code], RT I 2001, 61, 364.

²⁷ Decision of the Constitutional Review Chamber of the Supreme Court of 30 September 1994 in case III-4/A-5/94.

²⁸ Decision of the Administrative Law Chamber of the Supreme Court of 24 March 1997 in case 3-3-1-5-97.

²⁹ Julia Laffranque, 'Co-existence of the Estonian Constitution and European Law' [2002] 7 *Juridica International* 19–24.

³⁰ Ernits and others (n 5) 887–900.

³¹ Ibid 890–897.

³² Julia Laffranque, 'A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act' [2007] 12 *Juridica International* 56–57.

³³ Ibid.

³⁴ Madis Ernits and Andra Laurand, 'Kolmanda akti tõus ja langus' [2017] 1 *Juridica* 13–17.

whether and to what extent the Estonian Constitution should be interpreted in light of the Charter continues to cause disputes among the country's lawyers.^{*35}

3. The controversial position of the fundamental principles of substantive criminal law in EU law

The position of the fundamental principles of criminal law in EU law remains contested. The EU has no explicit competence to harmonise principles of criminal law – Article 83 TFEU permits only the adoption of minimum rules addressing the definition of criminal offences and sanctions.^{*36} Because the member states were concerned over the far-reaching changes that the Treaty of Lisbon introduced for criminal law, they even created special get-out clauses for exceptions from ordinary legislative procedure.^{*37} Articles 82(3) and 83(3) allow the member states to pull an emergency brake if they conclude that a particular draft directive would affect fundamental aspects of their criminal-justice system.^{*38} Although academics do not fully agree on the prerequisites for pulling the emergency brake, there is consensus that use of the emergency brake in accordance with Article 83(3) is justified in cases wherein the proposal for a directive would affect fundamental principles of the Member State's substantive criminal law.^{*39} The wording of the emergency-brake clause suggests that the scope is wider, covering not only principles of criminal law but, in fact, any important elements and characteristics of the Member State's criminal-justice system.^{*40} Still, the Member State should demonstrate why the relevant legal norm is considered fundamental to its criminal-justice system.^{*41}

However, these obstacles set up in the TFEU to stop EU law from influencing fundamental principles of the member states' substantive criminal law are somewhat of a fiction. The Treaty of Lisbon confers on the Charter, which covers principles of criminal law, legally binding status within the EU legal system, and the CJEU enjoys full competence over the former third-pillar law.^{*42} The preliminary-ruling procedure provided for in Article 267 TFEU enables the CJEU to ensure uniform interpretation of EU law.^{*43} In addition, the general principles of European Union law, which have even been described as EU law's equivalent of the concept of dark matter for their ability to develop over time, enable the union's legal order to evolve.^{*44} While some of the general principles of EU law created and applied by the CJEU have been codified in the treaty, others remain unwritten.^{*45} The nature of the general principles of EU law points to the relationship between EU primary law and national criminal law as not engraved in stone. Before the Lisbon Treaty,

³⁵ See Hent Kalmo, 'Põhiseaduse põkkumine Euroopa Liidu põhiõiguste hartaga' [2016] 3 *Juridica* 147-164; Uno Lõhmus, 'Repliik. H. Kalmo. Põhiseaduse põkkumine Euroopa Liidu põhiõiguste hartaga' [2016] 4 *Juridica* 292-293.

³⁶ Klip (n 2) 178-185.

³⁷ J-C Piris, 'The Lisbon Treaty: A Legal and Political Analysis' (Cambridge Studies in European Law and Policy, CUP 2010) 184-185. – DOI: <https://doi.org/10.1017/cbo9780511762529>.

³⁸ Upon pulling of the brake, the ordinary legislative procedure shall be suspended. After discussion, in cases of consensus the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same time frame, in the event of disagreement instead and if at least nine member states wish to establish enhanced co-operation on the basis of the draft directive involved, they shall notify the European Parliament, the Council, and the Commission accordingly. See arts 82(3) and 83(3) of the TFEU.

³⁹ Kaie Rosin and Markus Kärner, 'The Limitations of the Harmonisation of Criminal Law in the European Union Protected by Articles 82(3) and 83(3) TFEU' [2018] 26(4) *European Journal of Crime, Criminal Law and Criminal Justice* 316-327. – DOI: <https://doi.org/10.1163/15718174-02604003>.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Klip (n 2) 133-136, 251-256.

⁴³ *Ibid.*

⁴⁴ Armin Cuyvers, 'General Principles of EU Law' in Emmanuel Ugirashebuja and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 217-220. – DOI: <https://doi.org/10.1163/9789004322073>.

⁴⁵ *Ibid.*

the CJEU positioned fundamental rights among the general principles of EU law.^{*46} As the Charter is now legally binding in the EU, the position of the fundamental rights needs clarification by the CJEU.^{*47}

The impact of the Charter on the member states' criminal law is dependent on the scope of the Charter's application. According to Article 51(1) of the Charter, its provisions are addressed to the institutions, bodies, offices, and agencies of the European Union with due regard for the principle of subsidiarity and to the member states only when they are implementing union law. Article 51(2) stresses that the Charter does not extend the field of application of European Union law beyond the powers specified for that union or either establish any new power or task for the union or modify powers and tasks from what is defined in the establishing treaties. Earlier case law identified the CJEU's control over respect for fundamental rights as covering the measures adopted by the member states executing EU law and the measures adopted by the member states in line with the derogations expressly pertaining to fundamental rights and freedoms provided for by those treaties.^{*48} One can conclude that, at least since the *Fransson* case^{*49}, a bond exists between EU competencies and national law whenever inconsistency between domestic legislation and fundamental rights protected at the EU level represents an impediment to the implementation of EU law in the relevant field.^{*50} As EU law must always be implemented and applied in a manner honouring fundamental rights, Article 51(1) covers all cases wherein a linking *tessera* exists within EU law.^{*51} With *Siragusa*^{*52}, the CJEU listed specific points to be checked for purposes of assessing whether a connection between the national legislation under challenge and EU law truly exists: a) whether that legislation is intended to implement a provision of EU law; b) the nature of said legislation; c) whether it is aimed at objectives other than those covered by EU law, even if it could indirectly affect EU law; and d) whether there are specific rules of EU law on the matter in question that might affect it.^{*53} In conclusion, the national law has to be interpreted in light of the Charter if the legislation falls within the scope of EU law. The question of whether it does can itself be posed to the CJEU by means of the preliminary-reference procedure.

4. Fundamental principles of Estonia's substantive criminal law and their equivalents in EU law

Each of the subsections below examines one particular principle specific to substantive criminal law that is derived from the fundamental principles of the Estonian Constitution and has its equivalent in human-rights law. This examination of the existence of equivalence for the principle of legality of criminal law, the principle of retroactive application of the more lenient criminal law, the proportionality principle, *ultima ratio*, and the principle of individual guilt reveals that numerous questions as to the meaning and scope of these principles at union level remain unaddressed by the CJEU. According to Article 52(3) of the Charter, the minimum standard of protection provided by the Charter can be assumed on the basis of case law of the ECtHR, but the rest is open to the CJEU's interpretation.^{*54}

⁴⁶ Uno Lõhmus, 'Põhiõigused ja Euroopa Liidu õiguse üldpõhimõtted: funktsioonid, kohaldamisala ja mõju' [2011] 9 *Juridica* 639–642.

⁴⁷ *Ibid.*

⁴⁸ Valeria Scalia, 'Protection of Fundamental Rights and Criminal Law: The Dialogue between the EU Court of Justice and the National Courts' [2015] 3 *Eucrim* 102. – DOI: <https://doi.org/10.30709/eucrim-2015-013>.

⁴⁹ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] paras 16–31. ECLI:EU:C:2013:105.

⁵⁰ Scalia (n 48) 102–105; Karmo (n 35) 152–156.

⁵¹ *Ibid.*

⁵² Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* [2014] para 25. ECLI:EU:C:2014:126.

⁵³ Scalia (n 48) 102–105; Karmo (n 35) 152–156.

⁵⁴ Van Kempen (n 3) 250–252.

4.1. The principle of legality of criminal law

Although influenced by the legal order of the Council of Europe and of the EU from the beginning, the constitutional principles of Estonian substantive criminal law have a national origin and scope. The principle of legality of criminal law (expressed in Latin as *nullum crimen, nulla poena, sine lege scripta, stricta, praevia*), itself a sub-principle of the wider principle of the rule of law⁵⁵, is considered to be the cornerstone of Estonian criminal law.⁵⁶ It is enshrined in the Constitution's Section 23 (part 1 and the first sentence of part 2) in conjunction with Section 13(2).⁵⁷ Section 23(1) of the Constitution states that no-one may be convicted of an act that did not constitute a criminal offence under the law in force at the time the act was committed, and Section 23(2)'s first sentence adds that no-one may be subjected to a penalty that is more severe than whatever was applicable at the time the offence was committed. As for Section 13(2), it provides that the law shall protect everyone from the arbitrary exercise of state power. The elements of the principle of legality of criminal law are stated in Section 2, parts 1 and 4, and Section 5 of the Penal Code^{58, 59}

Article 49 of the Charter sets forth both the principle of legality and that of proportionality of criminal offences and penalties. Academic literature has distinguished substantive legality per Article 49 of the Charter from procedural legality under Article 52(1) of the Charter.⁶⁰ Still, the shorthand 'principle of legality' prevails for the principle enshrined in Article 49, both in the literature and in the case law of the CJEU.⁶¹ Article 49(1) of the Charter states: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.' Also, the principle of legality has long been recognised by the CJEU as a general principle of EU law.⁶² The CJEU case law addressing the principle of legality has been criticised for adhering to the minimum standard of protection with regard to the principle of legality.⁶³

In the *M.A.S. and M.B.* case⁶⁴, the CJEU demonstrated that the principle of legality is of different scope between EU law and Italian constitutional law: the legality principle in EU law protects only rules of substantive criminal law, not the extension of a limitation period by the national legislature and its immediate application.⁶⁵ In a contrast against *Melloni*⁶⁶, the CJEU allowed the Italian criminal courts to conform to their own national standards of protection even though doing so impaired the effectiveness of EU law in the field of the fight against fraud affecting EU financial interests.⁶⁷ The CJEU emphasised the direct effect of Article 325 (1 and 2) of the TFEU but also reiterated the general obligation of national courts to respect the fundamental rights and gave the national legal system space to apply the principle of legality in national proceedings.⁶⁸ In consequence, the CJEU avoided a direct constitutional

⁵⁵ Ernits and others (n 5) 907–908.

⁵⁶ Mario Truu, 'Pilk karistusõiguse lähteite: määratletuse põhimõttest süitekoosseisu sõnastamisel ja tõlgendamisel' [2019] 9 *Juridica* 671; Eerik Kergandberg, Saale Laos, and Heili Sepp, 'Paragrahv 23' in Ülle Madise (ed), *Eesti Vabariigi Põhiseadus, kommenteeritud väljaanne* (2020).

⁵⁷ Ernits and others (n 5) 920.

⁵⁸ Karistusseadustik [Penal Code], RT I, 10.07.2020, 18.

⁵⁹ Kergandberg and others (n 56).

⁶⁰ John AE Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice* (Università degli Studi di Trento 2014) 260.

⁶¹ See Klip (n 2) 196–202; Johannes Keiler and David Roef (eds), *Comparative Concepts of Criminal Law* (Intersentia 2019) 85–106.

⁶² Maria Kaiifa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' [2011] 1 *European Criminal Law Review* 21–23. – DOI: <https://doi.org/10.5235/219174411798862640>; Klip (n 2) 196–197.

⁶³ Mikhel Timmerman, 'Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT Fraud: Taricco' [2016] 53(3) *CML Rev* 792.

⁶⁴ Case C-42/17 *MAS and MB* [2017]. ECLI:EU:C:2017:936.

⁶⁵ Francesco Viganò, 'Melloni Overruled? Considerations on the "Taricco II" Judgment of the Court of Justice' [2018] 9(1) *New Journal of European Criminal Law* 18–23. – DOI: <https://doi.org/10.1177/2032284418760926>.

⁶⁶ Case C-399/11 *Melloni* [2013] paras 63–64. ECLI:EU:C:2013:107.

⁶⁷ Viganò (n 65).

⁶⁸ Valsamis Mitsilegas, 'Judicial Dialogue in Three Silences: Unpacking Taricco' [2018] 9(1) *New Journal of European Criminal Law* 38–42. – DOI: <https://doi.org/10.1177/2032284418761062>.

clash and the Italian Constitutional Court guaranteed that its position on the legality principle could not be jeopardised.^{*69}

4.2. The principle of retroactive application of the more lenient criminal law

Section 23(2) of the Estonian Constitution, in its second sentence, stipulates that if, subsequent to the commission of an offence, the law provides for a lighter penalty, the lighter penalty shall be applied. This section in conjunction with Section 12(1), which states that all people are equal before the law, forms a basis for the principle of retroactive application of the more lenient criminal law. The same is stated in Section 5(2) of the Estonian Penal Code. It is considered to be a separate principle from the *nullum crimen, nulla poena, sine lege scripta, stricta, praevia* enshrined in Section 23 (in part 1 and the first sentence of part 2).^{*70}

The principle of retroactive application of the more lenient criminal law has been recognised also as among the general principles of EU law, by the CJEU^{*71}. Article 49(1) of the Charter contains the same principle. In *Scoppola v. Italy*, the ECtHR deviated from the case law established by the European Commission in the case *X v. Germany* and affirmed that Article 7, Section 1 of the convention guarantees not only the principle of non-retrospectiveness of stricter criminal law but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law.^{*72} The ECtHR expanded the meaning of Article 7(1) while referring to Article 49(1) of the Charter and the *Berlusconi and Others* case, wherein it was held that this principle formed part of the constitutional traditions common to all member states.^{*73} In response to this judgement by the ECtHR, many member states had to adopt a more generous approach to the principle of the applicability of the more lenient criminal law.^{*74} It is evident, therefore, that the Charter has already affected member states' criminal law.

4.3. The principle of proportionality and *ultima ratio*

The principle of proportionality, which is also an element of the rule of law, has a key role in criminalisation and sentencing law.^{*75} The principle of proportionality is anchored in Section 11 of the Constitution of Estonia, which states: 'Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and must not distort the essence of the rights and freedoms restricted.' The Supreme Court of Estonia has stressed that criminal law as a whole is required to be in compliance with the principle of proportionality.^{*76} The *ultima ratio* principle, under which appealing to criminal law is permitted only as a last resort, has been categorised as subsidiary to the principle of proportionality in academic literature.^{*77} The Supreme Court of Estonia has stressed the significance of the principle of *ultima ratio* by identifying it as one of the most important principles of criminal law.^{*78}

The principle of proportionality has secured its place in the union's legal order as a general principle of EU law that has many dimensions.^{*79} It is expressed explicitly in the establishing treaties: Article 5(4) of the TEU states that '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives

⁶⁹ Ibid.

⁷⁰ Kergandberg and others (n 56).

⁷¹ Case C-420/06 *Jager* [2008] para 59. ECLI:EU:C:2008:152; see also Klip (n 2) 203–204.

⁷² *Scoppola v Italy* [GC] (No. 2) no. 10249/03, ECHR 17 September 2009, para 109.

⁷³ Ibid para 105.

⁷⁴ Van Kempen (n 3) 252–254.

⁷⁵ Hans Joachim Hirsch, 'Õigusriikliku karistusõiguse aktuaalsed probleemid' [2004] 3 *Juridica* 162–163.

⁷⁶ Decision of the Criminal Chamber of the Supreme Court of Estonia (20 February 2007) in case 3-1-1-99-06, para 22.

⁷⁷ Hirsch (n 75) 162; Nils Jareborg, 'Criminalization As Last Resort (*Ultima Ratio*)' [2004] 2(2) *Ohio State Journal of Criminal Law* 532.

⁷⁸ Decision of the Criminal Chamber of the Supreme Court of Estonia (9 November 2018) in case 1-17-6580, para 11.

⁷⁹ Joanna Długosz, 'The Principle of Proportionality in European Union Law As a Prerequisite for Penalization' [2017] 7 *Adam Mickiewicz University Law Review* 283–298. – DOI: <https://doi.org/10.14746/ppuam.2017.7.17>; Anabela Miranda Rodrigues, 'Fundamental Rights and Punishment: Is There an EU Perspective?' [2019] 10(1) *New Journal of European Criminal Law* 18–19.

of this Treaty'. Article 49(3) of the Charter states that the severity of penalties must not be disproportionate to the criminal offence, and its Article 52(1) specifies that any limitation to the exercise of rights and freedoms recognised by the Charter must be consistent with the principle of proportionality, with limitations to be undertaken only if they are necessary and genuinely in line with either objectives of general interest that are recognised as such by the European Union or the need to protect the rights and freedoms of others. The function of the principle of proportionality is to control the manner in which the European Union exercises its powers in relation to the member states and individuals and also to assess the activities of those states.^{*80}

Although the principle of proportionality is unquestionably a core principle of EU law, its application in the field of criminal law has been criticised in academic writings. The CJEU has received criticism for not acknowledging the different meaning of proportionality in the framework of law-making.^{*81} Also, the way in which the EU legislator has set repressive minimum standards for maximum penalties has raised great concern among academics.^{*82} Whether this process sufficiently accounts for the differences between the member states' sanction systems is debatable, so questions arise as to whether there are systematic problems in EU criminal law from the perspective of the principle of proportionality.^{*83}

On the union level, the *ultima ratio* principle can be linked to the principle of proportionality but also to that of subsidiarity.^{*84} *Ultima ratio* in EU law is recognisable in the principle of subsidiarity and in the limits the TFEU sets for the approximation of substantive criminal law.^{*85} Although *ultima ratio* has been recognised in several legal acts and in the practice of the CJEU, it is left to be developed mainly in legal scholarship with a national undertone.^{*86} Therefore, it is questionable whether the classic formulation of *ultima ratio*, which emphasises the repressive nature of the criminal-justice system and positions criminal law as the last resort of the legislator, is going to survive in the context of EU criminal law.^{*87}

4.4. The principle of individual guilt (*nulla poena sine culpa*)

The principle of individual guilt^{*88} (*nulla poena sine culpa*) is considered an Estonian constitutional principle in that it is rooted in the principles of human dignity and the rule of law.^{*89} The latter are both enshrined in Section 10 of the Constitution and recognised as fundamental principles of the Constitution.^{*90} Specifically, the Supreme Court of Estonia referred to the principle of individual guilt and its roots in the principles of human dignity and the rule of law in case 3-4-1-13-15.^{*91} The elements of the principle of individual guilt are listed in Section 32 and Section 56(1) of the Penal Code.^{*92}

The principle of guilt has received minimal attention in EU law and remains underdeveloped above national level, differing in meaning on the basis of the Member State whose law is involved.^{*93} Similarly to the ECHR in this respect, the Charter makes no specific provisions related to the principle of guilt.^{*94} The

⁸⁰ Długosz (n 79).

⁸¹ Ester Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?' [2010] 11(10) German Law Journal 1125-1126. – DOI: <https://doi.org/10.1017/s2071832200020137>; Matthias Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation' [2006] 12(4) European Law Journal 503. – DOI: <https://doi.org/10.1111/j.1468-0386.2006.00330.x>.

⁸² Długosz (n 79) 283-298; Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union – A New Approach' [2009] 1 Eucrim.

⁸³ Ibid.

⁸⁴ Sakari Melander, 'Ultima Ratio in European Criminal Law' [2013] 3(1) *Oñati Socio-legal Series* 42, 46-58; Długosz (n 79) 289-298; Rodrigues (n 79) 18.

⁸⁵ Melander (n 84).

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Also referred to in the shorter form 'principle of guilt'. See U Lõhmus, 'Kas kokkuleppemenetus on kooskõlas karistusõiguse süüühimõttega?' (2014) 7 *Juridica*; Sootak (n 9) 372.

⁸⁹ Lõhmus (n 88) 547.

⁹⁰ Ernits and others (n 5) 889.

⁹¹ Decision of the Constitutional Review Chamber of the Supreme Court of Estonia (23 September 2015) in case 3-4-1-13-15, para 39.

⁹² Sootak (n 9) 372.

⁹³ Van Kempen (no 3) 253-257, 263-264.

⁹⁴ Ibid.

ECtHR's case law on Article 6(2) (on presumption of innocence) and Article 7 (on the principle of legality) contains elements that are relevant with regard to substantive criminal law's principle of guilt, but the ECHR does not explicitly protect a principle of guilt for substantive criminal law.^{*95} Since articles 48 and 49 of the Charter are equivalent to the above-mentioned provisions of the ECHR, they should provide at least the same amount of protection.^{*96}

In competition-related cases, the CJEU has recognised the principle of guilt 'as typical of criminal law' by stating that criminal liability without the subjective element of guilt is compatible with European Union law.^{*97} In its future practice, the CJEU should recognise the principle of guilt as a distinct general principle of EU law or give this principle a stronger foundation in the union's law on the basis of Article 48 and Article 49 of the Charter.^{*98} The imposition of objective criminal liability in secondary law indicates a lack of respect for the principle of guilt in the legal order of the union.^{*99} As the influence of EU law on domestic criminal law grows, the underdevelopment of the principle of guilt at union level is becoming more problematic and might even lead to weakening of this principle in the member states' criminal law.^{*100}

5. Conclusion

EU law affects national principles of criminal law on many levels. Estonian criminal law is shaped by the regulatory triangle wherein the ECtHR, CJEU, and Member State courts interact. While many aspects of the relationship between EU law and national constitutions remain debatable, the impact of European Union law on national criminal law has increased remarkably since Lisbon: the Charter, which articulates principles of criminal law, is now legally binding in the EU, and the CJEU's jurisdiction has expanded to the former third-pillar area. Where national legislation falls within the scope of EU law, it has to be interpreted in light of the Charter; however, the case law of the ECtHR on the principle of retroactive application of the more lenient criminal law demonstrates that the Charter still can indirectly influence the principles of substantive criminal law expressed in a purely domestic law.

The principles of legality, proportionality, and retroactive application of the more lenient criminal law, which are considered to be fundamental principles of Estonian substantive criminal law, are all well-founded principles of EU law. They are recognised as general principles of union law and enshrined in the Charter of Fundamental Rights. In contrast, *ultima ratio* and the principle of individual guilt, other principles with constitutional standing in Estonian law, are not explicitly mentioned in the Charter. Although both are recognised in the case law of the CJEU and perceived to be attached to other general principles of EU law in legal dogmatics, they continue to be developed mainly at national level. Clearly, then, the relationship between EU law and the individual respective principles of substantive criminal law is not uniform. In particular, the underdevelopment of the principle of individual guilt on the union level has raised concerns among scholars, because this state of affairs could lead to the weakening of this principle on national level.

Many questions as to the meaning and scope of the principles of criminal law covered by the Charter remain unanswered, as they have not been addressed by the CJEU. The CJEU has so far shown willingness to supply only a minimum standard of protection for principles of substantive criminal law in the course of searching for balance between protection of fundamental rights and effectiveness of EU law. Although the CJEU avoided a constitutional clash in *M.A.S. and M.B.*, the judgement shows that the different meaning and scope of the principles of substantive criminal law on union level can potentially lead to conflicts between the member states' and European Union law.

⁹⁵ Kaiafa-Gbandi (n 62) 30; Van Kempen (n 3) 253–256.

⁹⁶ Ibid.

⁹⁷ Van Kempen (n 3) 256.

⁹⁸ Ibid 257–258.

⁹⁹ Kaiafa-Gbandi (n 62) 32.

¹⁰⁰ Van Kempen (n 3) 253–257, 263–264.